BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION
Docket No. 2000-516-C

Petition of	)	
	)	
ADELPHIA BUSINESS SOLUTIONS OF SOUTH CAROLINA, INC.	)	**DIRECT PREFILED TESTIMONY OF ADELPHIA BUSINESS SOLUTIONS OF SOUTH CAROLINA, INC.**
	)	
For Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)	

TESTIMONY OF TIMOTHY J. GATES

John Glicksman
Vice President and General Counsel
Terry Romine
Director of Regulatory Affairs
Adelphia Business Solutions
of South Carolina, Inc.
One North Main Street
Coudersport, PA 16915
(814) 260-3885 (Tel)
(814) 274-8243 (Fax)
e-mail: john.glicksman@adelphiacom.com
terry.romine@adelphiacom.com

Faye A. Flowers
Parker, Poe, Adams
& Bernstein, L.L.P.
1201 Main Street
Suite 1450
Columbia, S.C. 29201
(803) 255-8000 (Tel)
(803) 255-8017 (Fax)
e-mail: fayeflowers@parkerpoe.com

Michael L. Shor
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
202/424-7500 (Tel.)
202/424-7645 (Fax)
e-mail: mlshor@swidlaw.com

Its Attorneys

Dated: November 22, 2000

BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION
Docket No. 2000-516-C

Petition of	)	
	)	
ADELPHIA BUSINESS SOLUTIONS	)	
OF SOUTH CAROLINA, INC.	)	DIRECT PREFILED
	)	TESTIMONY OF
For Arbitration with BellSouth	)	ADELPHIA BUSINESS
Telecommunications, Inc. Pursuant to	)	SOLUTIONS OF SOUTH
Section 252(b) of the Communications	)	CAROLINA, INC.
Act of 1934, as amended by the	)	
Telecommunications Act of 1996	)	

TESTIMONY OF TIMOTHY J. GATES

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD.

A. My name is Timothy J. Gates. My business address is as follows: 15712 W. 72nd Circle, Arvada, Colorado 80007.

Q. BY WHOM ARE YOU EMPLOYED?

A. I am employed by QSI Consulting, Inc., ("QSI")

Q. PLEASE DESCRIBE QSI AND IDENTIFY YOUR POSITION WITH THE FIRM.

A. QSI is a consulting firm specializing in the areas of telecommunications policy, econometric analysis and computer aided modeling. I currently serve as Senior Vice President.

Q. ON WHOSE BEHALF WAS THIS TESTIMONY PREPARED?

A. This testimony was prepared on behalf of Adelphia Business Solutions of South Carolina, Inc. ("Adelphia").

Q. PLEASE DESCRIBE YOUR EXPERIENCE WITH TELECOMMUNICATIONS POLICY ISSUES AND YOUR RELEVANT WORK HISTORY.

A. Prior to joining QSI I was a Senior Executive Staff Member at MCI WorldCom, Inc. ("MWCOM"). I was employed by MWCOM for 15 years in various public policy positions. While at MWCOM I managed various functions, including tariffing, economic and financial analysis, competitive analysis, witness training and MWCOM's use of external consultants. I testified on behalf of MWCOM more than 150 times in 32 states and before the FCC on various public policy issues ranging from costing, pricing, local entry and universal service to strategic planning, merger and network issues. Prior to joining MWCOM, I was employed as a Telephone Rate Analyst in the Engineering Division at the Texas Public Utility Commission and earlier as an Economic Analyst at the Oregon Public Utility Commission. I also worked at the Bonneville Power Administration as a Financial Analyst doing total electric use forecasts while I attended graduate school. Prior to doing my graduate work, I worked for ten years as a forester in the Pacific Northwest for multinational and government organizations. TJG Schedule 1 to this testimony is a summary of my work experience and education.

Q. YOU SAID YOU TESTIFIED IN NUMEROUS STATES. DID YOU EVER FILE TESTIMONY IN SOUTH CAROLINA?

A. Yes, I did. Recently I filed testimony on behalf of US LEC, of South Carolina Inc. in its arbitration proceeding with BellSouth. See DOCKET NO. 2000-0446-C. I understand that this case was subsequently settled.

Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?

A. The purpose of my testimony is to address certain issues identified in the Adelphia Petition for Approval of Interconnection Agreement with BellSouth Telecommunications, Inc. ("BellSouth") that was filed on October 11, 2000, and an issue that was raised by BellSouth in its response. Specifically, I will address the following issues:

Issue 1 - (a) Rates for Leased Facility Interconnection; (b) Ensuring a Non-discriminatory Rate Structure for Leased Facility Interconnection;

Issue 2 - Definition of Local Traffic for Purposes of the Parties' Reciprocal Compensation Obligations Under Section 251(b)(5) of the Act;

Issue 3 – Should Internet Protocol Telephony be Considered Something Other Than Local Traffic for Purposes of Reciprocal Compensation?

Issue 4 – Should Reciprocal Compensation be Paid on Calls to or From an Enhanced Service Provider, Including an Internet Service Provider?

Issue 5 – Should Adelphia be Compensated at the Tandem Rate when It Terminates BellSouth Traffic?

Issue 6- How Should the Parties Define the Points of Interface ("POI") for Their Networks?

Q. HOW IS YOUR TESTIMONY ORGANIZED?

A. My testimony is organized by issue. The various discussions of the issues can be found on the following pages:

Q. PLEASE SUMMARIZE THE CONCLUSIONS YOU REACH IN YOUR TESTIMONY.

A. I will provide the summaries by Issue:

Issue 1(B) – BellSouth's definition of serving wire center and the use of that definition for determining compensation for leased facility interconnection is inappropriate and results in an artificial increase in costs for competitive local providers ("CLECs"). The cost differential is caused, in part, when BellSouth unilaterally locates its "POIs" away from Adelphia's switch. BellSouth's proposed language causes Adelphia to incur costs that BellSouth does not incur given the same network configuration. Adelphia proposes language that would ensure that symmetrical compensation is achieved.

Issue 2 – The use of NXX codes in the manner currently employed by Adelphia, other CLECs, and even BellSouth itself, allows consumers efficient

access to ISPs and other businesses that otherwise would be impossible if such calls were treated as toll calls or anything other than local. Calls to physical or virtual NXX numbers use the same path and the same equipment to reach the POI and the terminating carrier's switch. To single out the virtual NXX calls and to suggest that no compensation should be paid for purposes of carrying those particular calls ignores the simple economic reality that both kinds of calls are functionally identical and should be subject to reciprocal compensation. BellSouth's proposal would increase the cost of Internet access and reduce competition to the detriment of consumers, even though its own costs in handling these calls are the same as for any other locally-dialed call. The Commission should deny BellSouth's attempt to eliminate this type of local call from reciprocal compensation, and to apply switched access charges to ISP-bound and other kinds of virtual NXX calls.

Issue 3 – BellSouth's proposal conflicts with the Act, and represents an invitation to the Commission to assert jurisdiction over IP telephony thereby contradicting the FCC's "hands off" policy with respect to the treatment of such traffic.

Issue 4 – The Commission should re-visit its earlier determination and, in light of the current legal status of this traffic, conclude that there is no reasonable method or justification to distinguish ISP-bound calls from other local calls. The location of Adelphia's customers does not impact BellSouth's cost and should not be used to allow BellSouth to evade reciprocal compensation payments to CLECs. Consistent with public policy and

economic objectives, BellSouth should pay Adelphia reciprocal compensation for calls to those customers who happen to be ISPs. Finally, the FCC has repeatedly enforced the ESP exemption, such that enhanced service providers, including ISPs, do not pay access charges.

Issue 5 – Adelphia must meet only the geographic coverage criterion established by the FCC in order to qualify for tandem rate compensation. BellSouth is wrong to suggest that a functionality test also is required to receive such compensation. FCC Rule 51.711(a)(3) is very specific as to the requirement for tandem rate reciprocal compensation.

New Issue 6 – BellSouth's proposal to establish unilaterally POIs for BellSouth-originated traffic will require Adelphia to provide transport of traffic from multiple BellSouth POIs to its network, imposes material and entirely unnecessary costs on Adelphia, and represents an attempt to disadvantage Adelphia in the marketplace. Further, the proposal is inconsistent with the Act and FCC orders implementing the Act. BellSouth's proposal would make the FCC's single POI decisions meaningless, and would artificially increase the costs of its competitors to the detriment of competition and consumers.

ISSUE 1 – (A) MAY ADELPHIA CHARGE ITS TARIFFED RATES TO BELLSOUTH FOR LEASED FACILITY INTERCONNECTION; (B) IF NOT, SHOULD THE DEFINITION OF SERVING WIRE CENTER PRECLUDE ADELPHIA FROM RECEIVING SYMMETRICAL COMPENSATION FROM BELLSOUTH FOR LEASED FACILITY INTERCONNECTION?

Q. HOW HAVE ADELPHIA AND BELLSOUTH COMPENSATED EACH OTHER FOR THE USE OF INTERCONNECTION FACILITIES IN THE PAST?

A. I understand that the companies have charged tariffed rates for these facilities in the past. Gene Brown of Adelphia addresses this issue in his testimony.

Q. IF THE COMMISSION DETERMINES FOR POLICY REASONS THAT ADELPHIA MAY NOT CHARGE TARIFFED ACCESS RATES FOR INTERCONNECTION FACILITIES, WHAT WOULD BE A SECOND-BEST SOLUTION?

A. The Commission should ensure that the rates are symmetrical. Equity mandates that the rates for dedicated transport should be defined consistently for both parties. Even if the Commission ordered equal rates to be paid by the parties for the lease of interconnection facilities, BellSouth's proposal would impose a different rate structure on Adelphia than on itself for providing identical facilities. BellSouth's proposal would result in Adelphia incurring substantially greater costs than BellSouth for transporting and terminating traffic between the same two points.

Q. WHAT IS THE DISPUTE BETWEEN BELLSOUTH AND ADELPHIA ON THE DEFINITION OF SERVING WIRE CENTER?

A. Under the terms of the Agreement (Section 1.8 of Attachment 3), the party originating local traffic has the option to interconnect by purchasing dedicated interoffice channel transport ("DICT") from its "serving wire center" to the other party's "first point of switching." BellSouth has proposed a complicated rate structure for this form of transport that could, in some circumstances, result in BellSouth charging higher rates than Adelphia for physically identical transport facilities, depending on which party's traffic is being transported. Adelphia has proposed to add a paragraph, Section 1.8.5, to ensure that Adelphia may charge BellSouth for facilities in an amount equal to that which BellSouth may charge Adelphia for traffic on the same route.

Q. PLEASE EXPLAIN HOW BELLSOUTH'S PROPOSAL CAN LEAD TO TRANSPORT RATES THAT ARE NOT SYMMETRICAL.

A. BellSouth's rate structure for leased facility interconnection includes two different components: the "Local Channel Facility" ("LCF") and the DICT facility. The LCF extends from the "point of presence" ("POP") of the carrier ordering the transport service to the "serving wire center," while the DICT extends from the "serving wire center" to the first point of switching on the other party's network. The asymmetry arises from the proposed definition of "serving wire center."

Q. PLEASE DEFINE A SERVING WIRE CENTER.

A. Generally speaking, a serving wire center is synonymous with a central office. By central office, I am referring to a "class 5" central office where the local exchange company terminates the subscriber outside plant. Nevertheless, a carrier could designate a tandem switch location as its serving wire center. Essentially, a serving wire center is the central office with entrance facilities for the CLEC.

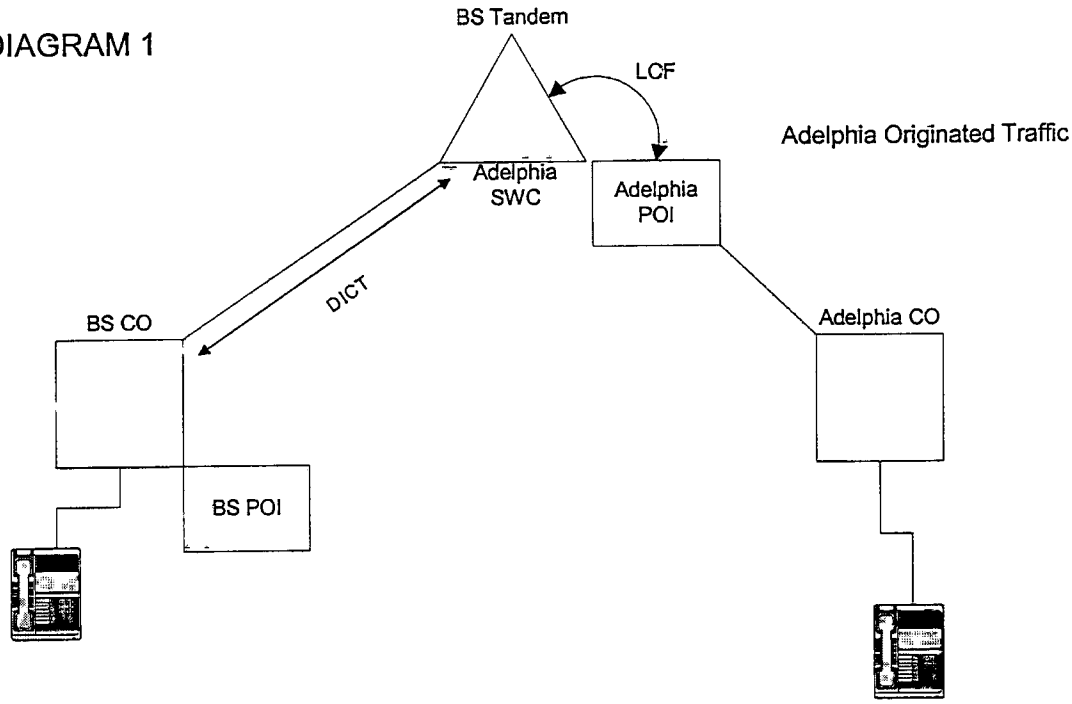
Q. DOES THE DEFINITION OF SERVING WIRE CENTER VARY BY CARRIER?

A. Yes, it may. As a new entrant into the local exchange telecommunications market, Adelphia utilizes state-of-the-art digital technology. When first entering a market, Adelphia typically installs only a single switch that serves an entire LATA. This single switch or central office would be considered BellSouth's serving wire center for purposes of terminating traffic originated by BellSouth subscribers. (In the BellSouth contract, the "BellSouth serving wire center" is the wire center on *Adelphia's* network from which service is provided to BellSouth, and vice versa. This terminology is confusing, but I use it to be consistent with the contract language.) BellSouth, however, has multiple central offices and/or wire centers per LATA. The BellSouth switch closest to the Adelphia switch is normally designated as Adelphia's serving wire center.

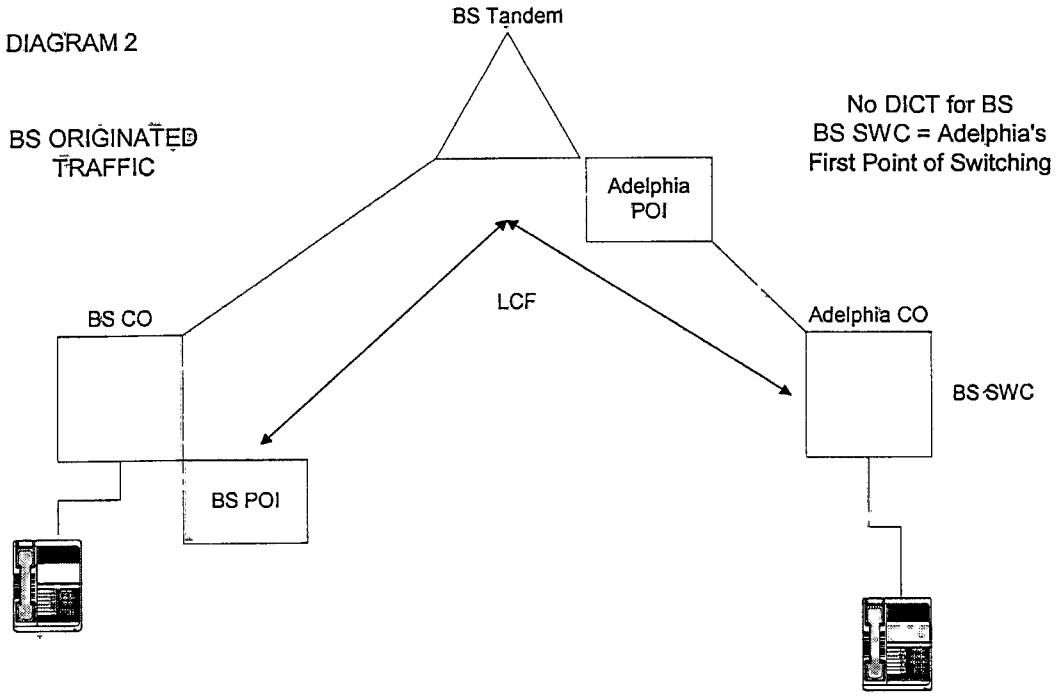
Let's assume that Adelphia customers are originating traffic that is terminated on the BellSouth network. Adelphia would purchase DICT (which

is charged on a per mile basis) between its serving wire center (the BellSouth central office or tandem) and BellSouth's first point of switching. The diagram below (Diagram 1) shows the DICT charged to Adelphia in this scenario.

DIAGRAM 1



Now, assuming the same network configuration, let's see how these terms and definitions impact the parties if BellSouth originates traffic that terminates on the Adelphia network. Diagram 2 below shows the same network configuration as Diagram 1.



In this scenario, however, according to BellSouth's definitions and proposed language, BellSouth would purchase DICT between its serving wire center (the Adelphia central office) and Adelphia's first point of switching (the same Adelphia central office). In other words, BellSouth would not purchase DICT from Adelphia, or it would purchase it at dramatically less than what Adelphia would have to pay. The fact that Adelphia is a new entrant with a single switch in the LATA results in dramatically different costs under BellSouth's proposed language.

Q. PLEASE EXPLAIN THE LOCAL TRANSPORT FACILITY ("LCF") AS INDICATED IN DIAGRAMS ONE AND TWO.

A. The LCF is a flat-rated, non-mileage sensitive switch transport facility between the POP (or the Point of Interface if Adelphia provides its own fiber

to BellSouth's tandem) and the originating party's serving wire center. Although the LCF appears longer for BellSouth when it originates local traffic, that rate element is flat-rated. As such, unlike the DICT, the mileage or distance of the LCF does not impact the cost.

Q. BUT DOESN'T THIS DICT PROPOSAL REFLECT THE ADDITIONAL COSTS THAT BELLSOUTH MUST INCUR TO PROVIDE FACILITIES FROM ADELPHIA'S SWITCH TO THE POI?

A. No. As is more fully set forth in my response addressing new Issue 6, below, this example highlights the anticompetitive impact of BellSouth's proposal to unilaterally designate POIs for BellSouth-originated traffic. If BellSouth designates POIs at end offices some distance from Adelphia's POP, the compensation will not be symmetrical. Indeed, BellSouth's proposal confirms the FCC's conclusion that --

> Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers. (*Local Competition Order* at paragraph 10; footnote omitted)[1]

BellSouth's proposal that would allow it to identify POIs for its originating traffic and impose a rate structure based on its historical

[1] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996), *modified on recon.,* 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.,* 119 S.Ct. 721 (1999), *on remand to Iowa Utils. Bd. v. FCC,* 219 F.3d 744 (8th Cir. 2000) ("*Local Competition Order*").

network architecture is unreasonable and will only serve to disadvantage CLECs such as Adelphia.

Q. IT IS ADELPHIA'S CHOICE TO PLACE ONE POI PER LATA. SHOULDN'T BELLSOUTH BE ALLOWED TO PLACE ITS POI AT ITS DESIRED LOCATION?

A. No. The Act and FCC orders clearly allow new entrants to interconnect at any technically feasible point. The single POI per LATA allows new entrants to grow their business economically, utilizing sound engineering principles, without having to duplicate the incumbent LECs' ("ILECs") existing network.

If Congress had wanted ILECs to have the ability to designate POIs and competitive LECs ("CLECs") to bear the same duty in establishing POIs as ILECs bear, it would have specifically stated that outcome, rather than separating out the interconnection obligations to apply only to ILECs under Section 251(c)(2).

Q. HAS THE FCC INTERPRETED SECTION 251 IN A SIMILAR MANNER?

A. Yes, it has. In the FCC's Local Competition Order at paragraph 220, it addressed technically feasible points of interconnection as follows:

> Section 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. The obligations of LECs that are not incumbent LECs are generally governed by sections 251(a) and (b), not section 251(c). Also, the statute itself imposes different obligations on incumbent LECs and other LECs (i.e., section 251(b) imposes obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs).

As such, BellSouth does not have the same right as CLECs to identify a technically feasible POI.

Q. DOES THE FACT THAT THERE IS NO PROHIBITION AGAINST ILECS DETERMINING TECHNICALLY FEASIBLE INTERCONNECTION POINTS GIVE THEM THE RIGHT TO DO SO?

A. No. As noted above, the interconnection obligations of LECs and ILECs are specifically identified in the Act. BellSouth may not assume some authority that is not provided for in the Act. As such, BellSouth is wrong to suggest that each party may determine the POI for its own originating traffic.

Q. WHAT IS THE SOLUTION TO THIS PROBLEM?

A. The Commission should adopt Adelphia's position.

ISSUE 2 – (A) SHOULD THE PARTIES BE OBLIGATED TO COMPENSATE EACH OTHER FOR CALLS TO NUMBERS WITH NXX CODES ASSOCIATED WITH THE SAME LOCAL CALLING AREA? (B) SHOULD BELLSOUTH BE ABLE TO CHARGE ORIGINATING ACCESS TO ADELPHIA ON ALL CALLS GOING TO A PARTICULAR NXX CODE BASED UPON THE LOCATION OF ANY ONE CUSTOMER?

Q. PLEASE BRIEFLY DESCRIBE THE DISPUTE ON THIS POINT.

A. Adelphia argues that BellSouth should be obligated to pay reciprocal compensation for all calls to numbers with "NXX" codes associated with the same local calling area. The local nature of a call is determined based upon

the NXX of the originating and terminating number. Adelphia argues that this practice should be continued such that calls between an originating and terminating NXX, associated with the same local calling area, should continue to be rated as local. Under any scenario, the only costs BellSouth incurs are the transport and switching charges required to bring traffic to the POI between BellSouth and Adelphia and these costs do not change based upon the location of Adelphia's customers. Further, it would be inconsistent and anti-competitive to allow BellSouth to evade its compensation obligations and, at the same time, to charge Adelphia originating switched access charges for calls going to a particular NXX code. Finally, the FCC's ESP Exemption specifically prohibits the imposition of access charges on enhanced service providers, including ISPs.

In contrast, BellSouth argues for overturning this historical system, complaining that it should not be required to pay reciprocal compensation even though a call would be rated as local by comparing the NXX codes of the originating and terminating callers. Further, BellSouth argues that it should be able to charge originating access charges for all calls to an NXX if a single customer with that NXX is physically located outside the local calling area. BellSouth provides no evidence that such calls increase its costs as compared to other local calls in any way such that additional cost recovery is justified.

Q. WHAT ARE NXX CODES?

A. NXX codes are the fourth through sixth digits of a ten-digit telephone number. These codes are used as rate center identifiers, but it is not uncommon for NXX codes to be assigned to customers who are not physically located in that rate center. When an ILEC provides this arrangement, it typically is called FX service. This type of arrangement has at times also been referred to as "Virtual NXX" because the customer assigned to the telephone number has a "virtual" presence in the associated local calling area. This flexible use of NXX codes allows carriers to offer valuable services to their customers. For instance, so-called virtual NXX arrangements enable ISPs, among other customers, to offer low cost, dial-up numbers, throughout South Carolina, including the more isolated areas of the State. Access to the Internet is affordable and readily available in all areas of the state because these NXX arrangements allow ISPs to establish a small number of points of presence (POP) that can be reached by dialing a number that is rated as local for the originating caller regardless of the physical location of the ISP (within the LATA).

Q. IS IT UNLAWFUL OR AGAINST ANY RULES FOR CLECS TO PROVIDE VIRTUAL NXXS TO THEIR CUSTOMERS?

A. No. The use of virtual NXX codes is not unlawful or in any other way improper. BellSouth, itself, provides a virtual NXX service to its customers, including ISPs, called foreign exchange service. Indeed, nobody complained about such uses of NXX codes until CLECs had some success in attracting

ISP customers and the ILECs began looking for any means possible to avoid paying CLECs for terminating calls to ISPs.

Q. PLEASE DESCRIBE THE IMPACT OF BELLSOUTH'S PROPOSED LANGUAGE WITH RESPECT TO THE CUSTOMER'S PHYSICAL LOCATION IN MORE DETAIL.

A. The language proposed by BellSouth would have at least three significant negative impacts in South Carolina. First, if the Commission adopted BellSouth's proposed language, BellSouth would be able to evade its reciprocal compensation obligations under the 1996 Act. Second, and also contrary to one of the fundamental goals of the 1996 Act, BellSouth's proposed language would have a negative impact on the competitive deployment of affordable dial-up Internet services in South Carolina, and on businesses that simply want an affordable way for their customers to reach them. Finally, BellSouth's proposed language would give BellSouth a competitive advantage over Adelphia in the ISP market.

Q. HOW WOULD BELLSOUTH EVADE ITS RECIPROCAL COMPENSATION OBLIGATIONS TO ADELPHIA BY LIMITING RECIPROCAL COMPENSATION TO CALLS TERMINATING TO A CUSTOMER WITH A PHYSICAL PRESENCE IN THE SAME LOCAL CALLING AREA AS THE ORIGINATING CALLER?

A. Ignoring the historical practice of rating a call as local based upon the NXX codes of the originating and terminating number would give BellSouth the ability to re-classify local calls as toll calls. This is because under BellSouth's

proposed language, it would be nearly impossible and much more economically burdensome for Adelphia (or any other CLEC in a similar situation) to utilize virtual NXXs in the provision of service to its customers.

Virtual NXXs are used by carriers to provide a local number to customers in calling areas in which the customer is not physically located. Customers (of both the ILECs and the CLECs) who are physically located in that calling area are then able to place local calls to the virtual NXX customer. If the Commission adopts BellSouth's language and no longer rates calls as local based on the NXX of the originating and terminating numbers, BellSouth customers would no longer be able to reach Adelphia end-users by dialing a local number and, because calls to those Adelphia end-users would be re-classified as toll calls, BellSouth would no longer be obligated to compensate Adelphia for handling what for decades have been rated as local calls.

Q. WOULD IMPLEMENTING BELLSOUTH'S PROPOSAL HARM THE DEVELOPMENT OF COMPETITION OR THE INTERNET ACCESS MARKET?

A. Yes. The Commission must consider the implications — for both the competitive telecommunications market and the Internet access market – of a decision that effectively precludes a carrier from providing local access for ISPs and other customers. BellSouth's proposal would have CLECs paying BellSouth a high per-minute charge for originating each local call while at the same time losing the ability to collect *any* compensation from BellSouth for terminating the call. What incentive will any carrier have to serve virtual NXX

customers including ISPs? What virtual NXX customer will want to expend the funds necessary to establish a physical presence in every single rate center? To whom will the virtual NXX customer turn in order to ensure that their own customers in South Carolina can continue to reach them via a locally dialed call to reach the Internet or the virtual NXX customer's location? The answers are self-evident and I will discuss later in this testimony how these considerations could affect the South Carolina telecommunications and Internet access markets.

Q. DO THE COSTS INCURRED BY BELLSOUTH DIFFER WHEN ONE OF ITS CUSTOMERS DIALS A VIRTUAL NXX NUMBER AS OPPOSED TO A PHYSICAL NXX?

A. No. There is no additional cost incurred by BellSouth when a virtual NXX is provided to a CLEC customer, because BellSouth carries the call the same distance and incurs the same costs regardless of whether the call is terminated to a CLEC customer with a physical location in the NXX rate center, or a CLEC customer with a virtual presence. BellSouth's obligations and costs are therefore the same in delivering a call originated by one of its customers, regardless of whether the call terminates at a so-called "virtual" or "physical" NXX behind the CLEC switch.

At a time when regulators and the industry are looking to move to more competitive market models by eliminating implicit subsidies in telecommunications rates and inter-carrier payments, it would seem contrary suddenly now to foist originating switched access charges on a certain type of

customer traffic when the costs of originating that traffic do not differ from any other local call.

Q. PLEASE EXPLAIN HOW A CALL IS ROUTED IN A COMPETITIVE ENVIRONMENT.

A. Let me first explain how a call to a customer with a physical presence is routed. Assuming a BellSouth customer originates a call to an Adelphia customer, BellSouth is financially and operationally responsible for getting the call to Adelphia's POI. BellSouth switches and transports the call to the POI. From the POI, Adelphia is financially and operationally responsible for terminating the call for BellSouth – again, switching and transporting the call to the called party, wherever that party might be located. In return, BellSouth pays Adelphia for terminating the call. The originating carrier is compensated for its portion of the call through local rates, vertical features (i.e., call waiting, call forwarding, star codes), EAS arrangements, subscriber line charges and other subsidies, such as access charges, that support local rates. The routing and compensation responsibilities are reversed if an Adelphia customer calls a BellSouth customer.

Q. HOW DOES THIS DIFFER FOR A CALL PLACED TO A CUSTOMER WITH A VIRTUAL PRESENCE?

A. It doesn't. BellSouth routes the call to the POI in exactly the same manner.

Q. DOES THE USE OF VIRTUAL NXX CODES IMPACT THE HANDLING OR PROCESSING OF A CALL TO AN ADELPHIA CUSTOMER?

A. No. BellSouth would always be responsible for carrying the call to the POI on its own network and then paying for delivery of the call over the same distance (from the POI to the CLEC switch). The use of a virtual NXX does not impact BellSouth's financial and/or operational responsibilities such that it would be able to avoid paying compensation to the terminating LEC or collecting additional compensation. Indeed, Adelphia's customer has a presence in the local calling area of the originating caller, it is just a virtual presence, not a physical one, but the way the call is handled is the same from BellSouth's perspective.

Q. DOES THE PHYSICAL LOCATION OF THE CUSTOMER IMPACT BELLSOUTH'S COSTS AND/OR RESPONSIBILITIES?

A. No. BellSouth's costs of transporting and terminating traffic are not impacted by the location of the customer where the call terminates and/or the extent to which the terminating customer is a residence, business or Internet Service Provider. Regardless of where Adelphia's customer is located, BellSouth only is responsible for getting the call to the POI where Adelphia takes over and assumes responsibility for terminating the call. The location of the called party does not change the handling of the call by BellSouth or Adelphia, nor does it change BellSouth's costs of handling the call. Therefore, there is no rational cost basis for allowing BellSouth to avoid paying terminating compensation on this call or to impose originating access charges.

Q. DO YOU AGREE WITH BELLSOUTH'S ATTEMPT TO LIMIT ITS OBLIGATION TO PAY RECIPROCAL COMPENSATION WHERE VIRTUAL NXXS ARE INVOLVED?

A. No. BellSouth insists on language that would limit the reciprocal compensation obligations by changing the definition of local calls entirely and classifying as "local" only those calls originating and terminating to customers located physically within the same local calling area. This position is anti-competitive and should be rejected by this Commission.

Q. WHAT ARE THE FLAWS IN BELLSOUTH'S POSITION?

A. BellSouth's definition of local calls subject to reciprocal compensation would eliminate reciprocal compensation for terminating BellSouth customer calls to an entire class of customers who purchase local exchange service. It is predicated on a self-serving approach to rating calls, one that discards the decades long approach of relying upon the NXXs of the originating and terminating numbers. BellSouth simply cannot show that calls to Adelphia customers which utilize a "virtual NXX" number are any different than other local calls.

Q. PLEASE SUMMARIZE YOUR POSITION ON THIS POINT.

A. A call originated on the BellSouth network using a physical or virtual NXX and directed to any CLEC's network travels the same path and requires the use of the same facilities as would any other local call. Calls to physical or virtual NXX numbers use the same path and the same equipment to reach the POI and the terminating carrier's switch. To single out the virtual NXX calls and to

suggest that no compensation should be paid for purposes of carrying those particular calls ignores the simple economic reality that both kinds of calls are functionally identical and should be subject to reciprocal compensation.

Q. PLEASE EXPLAIN WHY IMPOSITION OF ORIGINATING ACCESS CHARGES ON ADELPHIA FOR VIRTUAL NXX CALLS IS INAPPROPRIATE.

A. There are two reasons: First, BellSouth and Adelphia provide the same network functions whether the call is to a physical presence or to a virtual presence. Therefore, the compensation should be the same. Indeed, the *TSR Order* at paragraph 34 specifically notes that "The Local Competition Order requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation."[2] In that same paragraph, the FCC states, "This regime represents 'rules of the road' under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company." (emphasis added)

As I have shown, calls to a virtual NXX are handled and processed in the same manner as any other local call. Deciding now that virtual NXX calls should somehow be treated differently would effectively render meaningless any future decision by this Commission that reciprocal compensation is due

[2] *See TSR Wireless v. US WEST, et al.*, Memorandum and Order, FCC 00-194, ¶ 34 (rel June 21, 2000).

for ISP-bound traffic, since ISPs are often served through such arrangements. Moreover, all other virtual NXX customers would be similarly disadvantaged.

BellSouth's proposal is especially egregious given that BellSouth's costs do not change depending upon the location of the called party. Regardless of the customer's location, BellSouth's responsibility for carrying originating, locally-dialed traffic, on its own network will always end at the POI, where its network ends and Adelphia's network begins. Its responsibility for transporting traffic to Adelphia will always end at the POI, regardless of where the customer is served beyond that point. Thus, BellSouth's costs and obligations in originating a locally-dialed call from a particular BellSouth customer cannot differ because of where Adelphia's customer is located. Given that there is no cost difference, it would be arbitrary to impose a different rate structure on these virtual NXX calls.

Increasing the cost of Internet access through the introduction of access charges and the denial of reciprocal compensation would be inconsistent with the Act's mandate for Internet services. More specifically, Section 230(b)(2) (47 U.S.C. 230) of the Act states "It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or state regulation." To the extent BellSouth's proposal to distinguish Internet usage from other local usage increases the cost and depresses demand for Internet usage, it is not in the public interest.

Q. WHAT IS THE SECOND REASON THAT IMPOSING ACCESS CHARGES ON VIRTUAL NXX CALLS IS INAPPROPRIATE?

A. BellSouth's access charges are not cost-based and it has been federal and state policy to drive access charges down to cost. It makes no sense to impose an out-dated compensation regime on an artificial category of traffic.

Q. WHY IS IT IMPORTANT FOR ADELPHIA TO PROVIDE ITS CUSTOMERS WITH VIRTUAL NXXS?

A. Adelphia and other CLECs provide (and, as discussed below, seemingly BellSouth itself provides) a valuable service to customers by providing them with service that utilizes virtual NXXs. For example, Adelphia may attract certain customers, including ISP customers, by providing virtual NXXs. The virtual NXX allows the subscribers to access the Internet and businesses by calling a local number, even though the ISP's POP and the business may be further away.

A key competitive advantage – indeed, a practical business necessity – for any virtual NXX customer is having a local dial-up number for a prospective customer. Because Internet-bound calls are often longer in duration than other calls, avoiding toll charges associated with accessing an ISP's POP that is not located in the user's rate center dramatically reduces the user's Internet costs. Therefore, ISPs will often choose their carrier based on the carrier's ability to provide local dial-up capability via the virtual NXX.

Q. HOW WOULD THE COMPETITIVE DEPLOYMENT OF AFFORDABLE INTERNET SERVICES BE IMPACTED IF THE COMMISSION DECLINES TO REVERSE ITS PREVIOUS EXCLUSION OF ISP TRAFFIC FROM RECIPROCAL COMPENSATION AND IF BELLSOUTH DOES NOT COMPENSATE ADELPHIA ON VIRTUAL NXX CALLS?

A. By contractually limiting reciprocal compensation based on the location of customers, the costs associated with accessing the Internet would increase. By using virtual NXX assignments, Adelphia and other CLECs have been able to provide services that allow ISPs to provide low cost Internet services throughout South Carolina. To not pay reciprocal compensation for these local calls would be a step in the wrong direction in the deployment of affordable Internet services in South Carolina, as the end result would be a decrease in usage of Internet services by South Carolina citizens facing the prospect of toll charges or other increased costs to access their ISPs.

This would be in direct conflict with the 1996 Act, which calls for consumers in all regions of the Nation, including those in rural, insular, and high cost areas, to have access to telecommunications and information services at just, reasonable, and comparable rates. (Sec. 254(b), 47 U.S.C. § 254(b)).

Q. WOULD BELLSOUTH'S PROPOSED LANGUAGE GIVE IT A COMPETITIVE ADVANTAGE IN THE ISP MARKET?

A. Yes. BellSouth markets certain products to ISPs. These service offerings appear to be no different from what CLECs such as Adelphia offer their own

ISP customers using a virtual NXX arrangement. If CLECs are prohibited from receiving reciprocal compensation for virtual NXX calls to prospective and current ISP customers through BellSouth's proposed contract restrictions, ISPs would either have to establish multiple POPs in order to allow their subscribers to access the Internet via a local number or to contract with BellSouth and subscribe to BellSouth's ISP products. Because each POP requires a significant investment in hardware, non-recurring charges and leased line connections, and because provisioning services in new areas may cause delays in ISP service offerings, the ability to offer ISP customers local dial-up and single POP capability is a critical competitive consideration. More importantly, forcing ISPs and CLECs to deploy these facilities – when, as described above, such deployment is not at all necessary – would encourage inefficiency and a wasteful allocation of limited CLEC resources. Only BellSouth, with its ubiquitous network developed with the support of decades of subsidies, could likely offer ISPs the kind of presence required in each local calling area to avoid a virtual NXX situation. Moreover, by precluding Adelphia from receiving reciprocal compensation for these services, and then threatening to impose higher access charges on each call, BellSouth is creating an economic barrier to any other carriers providing service to ISPs, and is giving itself a significant competitive advantage. This clear advantage for BellSouth would not only stifle the ability of CLECs such as Adelphia to provide service to ISPs in South Carolina, but would essentially eliminate the prospect for competition in this market.

Q. PLEASE SUMMARIZE YOUR POSITION ON WHETHER ORIGINATING ACCESS CHARGES SHOULD BE APPLIED TO CALLS UTILIZING VIRTUAL NXX CODES.

A. The use of virtual NXX codes allows consumers efficient access to business and ISPs that would otherwise be impossible if such calls were treated as toll calls. Further, treating calls to virtual NXX numbers as something other than local would inappropriately allow BellSouth to avoid payment of reciprocal compensation and give BellSouth a competitive advantage over CLECs in the market. For all these reasons, the Commission should adopt Adelphia's position and delete BellSouth's proposed language that would impose originating access charges and eliminate reciprocal compensation for local calls based on the physical location of the end-user, and the Commission should specifically find that calls to ISPs should be treated as local calls since there are no additional costs or responsibilities borne by BellSouth.

ISSUE 3 = SHOULD INTERNET PROTOCOL TELEPHONY BE EXCLUDED FROM LOCAL TRAFFIC SUBJECT TO RECIPROCAL COMPENSATION?

Q. PLEASE DISCUSS THE DISPUTE BETWEEN ADELPHIA AND BELLSOUTH REGARDING "INTERNET PROTOCOL TELEPHONY."

A. The dispute centers on BellSouth's attempts to create a category of calls for which *no* compensation would be provided to Adelphia, or any other terminating CLEC. The parties agree to disagree on whether the definition of

Switched Access Traffic should include IP Telephony. BellSouth, however, has proposed an additional sentence to the definition of Switched Access Traffic providing that "irrespective of the transport protocol method used, a call which originates in one local calling area and terminates in another local calling area . . . shall not be compensated as local." Although BellSouth's proposal would clearly operate to exclude IP telephony traffic from being subject to reciprocal compensation, it is also intentionally vague. BellSouth's proposed language conflicts with the Act, and represents an invitation to the Commission to assert jurisdiction over IP Telephony thereby contradicting the FCC's "hands off" policy with respect to the treatment of such traffic.

Q. HOW DOES THE ACT RESOLVE THIS ISSUE?

A. The Act does not address the proper treatment of IP Telephony. The Act does, however, establish a system where all carriers are to receive compensation for the costs they incur in transporting and terminating traffic. Section 251(b)(5) of the Act requires local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The Act does not expressly limit this obligation or exclude any particular category of traffic. Section 251(g), however, requires continued enforcement of the existing access charge regime, which, until it is superseded, provides for an alternative system of compensation for the transport and termination of telecommunications carried by three or more carriers. The only way to reconcile the two sections and give meaning to both, is to understand that the reciprocal compensation provision of Section

251(b) is intended to apply to compensation for traffic otherwise exempt or not subject to access charges – that is, for the transport and termination of local traffic carried by two carriers.

This is the conclusion reached by the FCC in its *Local Competition Order.* The FCC explained that the existing regulatory regime, in which interstate and intrastate inter-exchange traffic was subject to access charges, is to be maintained pursuant to Section 251(g) of the Act. Traffic not subject to access charges, i.e., traffic that originates or terminates within a local calling area established by the state, or traffic otherwise not subject to access charges, would be subject to reciprocal compensation obligations. The simple logic drawn from the Act is that access charges and reciprocal compensation are intended to dovetail to cover all types of traffic carried by two or more carriers; such traffic is to be treated either through reciprocal compensation or access charges, and no traffic is to incur both types of treatment. Thus, the statutory scheme requires, and the FCC has established that under the Act, the termination of traffic carried by two carriers not otherwise subject to access charges is subject to reciprocal compensation.

Q. TURNING TO THE PROVISION PROPOSED BY BELLSOUTH, CAN YOU PLEASE EXPLAIN WHY YOU ARE OPPOSED TO THIS?

A. Yes. First, I object to BellSouth's invitation to the Commission to establish the appropriate regulatory treatment for IP Telephony. I also object to BellSouth's attempt to use arbitration against a single carrier as a forum to establish the appropriate regulatory treatment for IP telephony. Finally, BellSouth should

not be permitted to make an end run around the FCC's jurisdiction over this issue.

Q. WHAT DO YOU THINK IS WRONG WITH BELLSOUTH'S PROPOSAL?

A. The fundamental problem is that BellSouth's proposal arbitrarily creates a third category of traffic for which carriers such as Adelphia will be denied the reciprocal compensation that is required under the Act. Additionally, BellSouth's proposed language would deny reciprocal compensation to Adelphia for this "category" of traffic, *even if the FCC expressly determined that reciprocal compensation was due*. Although the agreed upon language recognizes the FCC's jurisdiction to determine the nature of voice over Internet Protocol ("VOIP") traffic, the agreement's "provided . . . that" clause means that BellSouth's exclusion will apply notwithstanding any FCC determinations. Adelphia will incur costs for terminating and transporting BellSouth's traffic, and there is simply no legal or policy basis for denying compensation to Adelphia.

Q. ARE THERE OTHER REASONS WHY THE COMMISSION SHOULD REJECT BELLSOUTH'S PROPOSED LANGUAGE REGARDING VOIP?

A. Yes. The Commission should reject BellSouth's scheme because it is vague and unworkable. There is no known way to separate out the type of traffic that BellSouth has tried to define. For example, for calls placed to ISPs, there is no technical way to determine whether the packets of data that make up Internet Protocol traffic are transmitting voice, video, pictures, or a computer program – all of which can occur during the course of a single call to an ISP

and can even occur simultaneously. There is also no way to determine the location of the party or parties receiving any ISP-based IP voice transmission. Furthermore, the sheer vagueness of BellSouth's proposed language appears to represent a backdoor attempt to undermine the payment of reciprocal compensation for all ISP-bound traffic. BellSouth's language – "irrespective of the transport protocol method used, a call which originates in one local calling areas and terminates in another local calling area" – is not limited to voice calls, and could be interpreted to describe other types of calls, including ISP-bound calls.

Finally, BellSouth's proposal conflicts with FCC policy. The FCC maintains a "hands-off" approach to Internet Protocol telephony and has not imposed legacy, circuit-switched regulatory requirements on providers of Internet Protocol telephony. BellSouth is asking the Commission to contradict that federal policy. Adelphia urges the Commission not to adopt regulations that contradict federal policy, especially in a single arbitration between two carriers.

Q. HAS THE FCC ADDRESSED SIMILAR ATTEMPTS TO CLASSIFY IP TELEPHONY WITHOUT THE DEVELOPMENT OF AN ADEQUATE RECORD?

A. Yes, they rejected it. In an attempt to reduce the reporting requirements placed on interstate common carriers, the FCC consolidated a number of worksheets carriers complete to support various federal programs. When the FCC proposed the consolidated worksheet, it included language that would

have required carriers to report as telecommunications revenue, revenue from "calls handled using internet technology as well as calls handled using more traditional switched circuit techniques."[3] The FCC removed this language when it adopted the final consolidated worksheet:

> As noted by certain commenters, this Commission in its *April 10, 1998 Report to Congress* considered the question of contributions to universal service support mechanisms based on revenues from Internet and Internet Protocol (IP) telephony services. We note that the Commission, in the Report to Congress, specifically decided to defer making pronouncements about the regulatory status of various forms of IP telephony until the Commission develops a more complete record on individual service offerings. We, accordingly, delete language from the instructions that might appear to affect the Commission's existing treatment of Internet and IP telephony.[4]

Q. HOW DID THE FCC DEFINE INTERNET PROTOCOL TELEPHONY IN THE APRIL 1998 REPORT TO CONGRESS?

A. The April 1998 Report to Congress did not include a definition of Internet Protocol telephony. The FCC briefly reviewed one service, described as "phone-to-phone" Internet Protocol telephony, but it deferred making any definitive classification of even this service until a better record could be established.[5]

---

[3] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998).

[4] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, ¶22 (rel. July 14, 1999) (footnotes omitted).

[5] *Report to Congress* ¶¶88-89.

Q. IS THIS ARBITRATION AN APPROPRIATE FORUM TO ADDRESS THE QUESTION OF WHETHER INTERNET PROTOCOL TELEPHONY SHOULD BE EXCLUDED FROM RECIPROCAL COMPENSATION OR SUBJECTED TO OTHER FORMS OF TRADITIONAL TELECOMMUNICATIONS REGULATION?

A. No. As an initial matter, the questions of how (if at all) Internet Protocol telephony should be regulated are before the FCC.[6] On April 5, 1999, Qwest, f/k/a U S WEST, submitted a petition for declaratory ruling asking the FCC to determine that certain types of phone-to-phone Internet Protocol telephony are subject to access charges. The FCC has taken no action on Qwest's petition. Adelphia recommends that this Commission continue to defer consideration of the proper treatment of IP Telephony until the FCC takes action. It would be an administrative nightmare for all parties involved if the two regulatory bodies were to adopt inconsistent rulings.

Second, this arbitration is not the appropriate place to determine whether Internet Protocol telephony should be excluded from reciprocal compensation because any ruling will bind only BellSouth and Adelphia. This could put Adelphia at a competitive disadvantage *vis-a-vis* other LECs operating in South Carolina that do not have such a provision included in their interconnection agreements. As such, any consideration of this issue should be done after the FCC issues its decision and in a generic proceeding.

Third, if the Commission were to determine for the first time to exclude

Internet Protocol telephony from reciprocal compensation, it would do so without the benefit of a record that could be established in a generic proceeding open to all LECs, interexchange carriers, ISPs and Internet Protocol telephony providers. The Commission should not permit BellSouth to establish such precedent in an arbitration against a single carrier on an issue this far-reaching.

Finally, it is dangerous to address only one piece of the puzzle. If the Commission were to rule in BellSouth's favor, it would have to find that Internet Protocol telephony is a third type of telecommunications service that is exempt from the Act's reciprocal compensation requirement. The classification of Internet-based services raises many complicated and overlapping issues, with implications far beyond reciprocal compensation. If the Commission, contrary to our recommendation, decides to address this issue prior to a FCC determination, the Commission must at least examine all relevant issues in a proceeding open to all affected parties before determining that Internet Protocol telephony traffic is not entitled to reciprocal compensation under the Act.

Q. HAS THE FCC ISSUED ANY POLICY STATEMENTS ABOUT THE TREATMENT OF INTERNET PROTOCOL TELEPHONY?

A. Yes. In an interview earlier this year, Chairman Kennard was emphatic about maintaining the FCC's "hands-off" the Internet approach:

> [L]egacy regulation is not necessarily appropriate to emerging

[6] Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony (filed April 5, 1999).

> technologies... We do not want to impose the kind of legacy regulation that we're trying to work our way out of onto a new technology that may bring exciting consumer benefits....We're going to move into a future where people will be able to make telephone calls using the Internet over satellite platforms, terrestrial wireless platforms, copper wire platforms, copper cable platforms. The last thing we want to do is try to fit this new technology into old boxes.[7]

Chairman Kennard reiterated this position in a recent speech to an IP Telephony industry group:

> Your industry is on the map now. How do I know that? It's not just because this conference gets bigger and bigger every year. It's because in Washington I am beginning to hear calls for a level playing field. I hear this a lot in my job. Everyone says that I have to guarantee a level playing field. I've learned that when most people ask me to level the playing field, they want less regulation for themselves and more for their competitors.
>
> And today, people are telling me that voice communications, whether delivered by the Internet or the traditional phone companies, should be treated the same: licensed the same, regulated the same and taxed the same. In other words, more regulation for IP telephony.
>
> After all, the logic goes, bits are bits, and all bits are created equal -- and should be treated equally. But while symmetry may be important in art and architecture, in the world of economic regulation, it's not necessarily so. In regulation, symmetry does not necessarily equate with fairness. We have to distinguish between treating the same differently and treating that which is different the same. A heavyweight and a middleweight may box in the same ring, but no one would say that it's a fair fight.
>
> So is it a fair fight to expect a start-up just out of the incubator to take on a hundred-year-old incumbent - an incumbent which, thanks to an exclusive franchise given by government, owns 96% of the local market? The fact is, not all bits are created equal. It's not that we don't want a level playing field. In fact, we are working hard to liberate all competitors from regulation. But during this transition, the answer is not to saddle nascent technology with the increasingly obsolete legacy regulations of

[7] *See Kennard Pledges No Regulation for Internet Telephony*, Warren's Washington Internet Daily, pp. 1-5 (May 25, 2000).

the past.

It's not that one playing field is level and the other is not. They're two different playing fields. Their architectures fundamentally differ, and so should their rules. In short, one-size regulation does not fit all.

That's why I think treating incumbents and newcomers in a market the same would only result in creating barriers to new entrants and killing innovation. *It just doesn't make sense to apply hundred-year-old regulations meant for copper wires and giant switching stations to the IP networks of today.*

* * *

[R]egulation is too often used as a shield, to protect the status quo from new competition - often in the form of smaller, hungrier competitors -- and too infrequently as a sword -- to cut a pathway for new competitors to compete by creating new networks and services. You see, all too often companies work to change the regulations, instead of working to change the market. I call this behavior "regulatory capitalism."

Regulatory capitalism is when companies invest in lawyers, lobbyists and politicians, instead of plant, people and customer service. It's always easier to prowl the halls of Congress than compete in the rough and tumble of the marketplace. Regulatory capitalists would rather litigate than innovate. We have seen this in some foreign markets. Rather than compete against IP telephony, incumbents get their cohorts in government to simply outlaw it. Criminalize it.

Regulatory capitalism always works best for companies that have the resources and know-how to play the regulatory game. And, trust me, it's never the newcomers. Most new industries - yours included - don't have the time or resources to spend money on oak paneled law firms and limousine lunches. Bob Pepper told me that instead of unbundling monopoly networks for competitors, we should unbundle some lawyers for them. You know, there may be something to that.

But what your industry needs most is not more lawyers and lobbyists. What it needs is some space to do what you're best at. You need to be working on new applications and new business models, on perfecting your technology. Like the emerging broadcast industry at the time of Bill Paley, now is the time for you to invent new paradigms, new ways of using your

> technology to provide service to the public. The best thing we can do for ourselves is to give you the time and space to create and grow. So that is my pledge to you: to stay out of your way.[8]

Q. IN OTHER ARBITRATIONS, BELLSOUTH HAS MADE THE DISTINCTION BETWEEN IP TELEPHONY OVER THE PUBLIC INTERNET AND IP TELEPHONY OVER PRIVATE IP NETWORKS. DO YOU THINK CHAIRMAN KENNARD'S COMMENTS REGARDING THE "NON-REGULATION" OF IP TELEPHONY WERE INTENDED TO ADDRESS ONLY IP TELEPHONY OVER THE PUBLIC INTERNET?

A. It doesn't appear so. First, Chairman Kennard's remarks were made to the IP Telephony industry as a whole – had he intended to draw a distinction between IP Telephony over public vs. private networks, he surely would have made this clear. If anything, by referring to "the IP networks of today" without reference to IP telephony over the public Internet, Chairman Kennard appears to be concerned with all forms of IP telephony. For Chairman Kennard, the relevant distinction is between legacy switched networks controlled by incumbents, such as BellSouth, and the deployment of new technologies by new entrants, such as Adelphia. Thus, Chairman Kennard's comments are extremely relevant to what BellSouth is asking of the Commission in this arbitration – the Commission should carefully consider his advice. Finally, although much of the speech has been excerpted above, if the Commission

[8] *See Internet Telephony: America Is Waiting,* Remarks By FCC Chairman William E. Kennard Before The Voice Over Net Conference, September 12, 2000, Atlanta, Georgia (http://www.fcc.gov/Speeches/Kennard/2000/spwek019.txt) (emphasis supplied).

has any question regarding the context of Mr. Kennard's comments, the entire text is available at http://www.fcc.gov/commissioners/kennard/speeches.html.

Q. WHY IS THIS "HANDS-OFF" APPROACH GOOD POLICY?

A. Internet Protocol telephony is in its infancy, and, as Chairman Kennard explained, regulators may stunt its growth and stifle innovation by imposing regulations designed for circuit-switched networks. At the very least, regulators must consider such policy issues holistically. The scope of interconnection arbitrations do not permit this Commission the luxury of fully examining the impact of putting Internet-related services in a particular regulatory box. Because BellSouth's proposal is vague and the adoption of the proposal contradicts FCC precedent, the Commission should reject BellSouth's proposal and adopt Adelphia's.

ISSUE 4 – SHOULD THE PARTIES BE REQUIRED TO PAY RECIPROCAL COMPENSATION ON TRAFFIC ORIGINATING FROM OR TERMINATING TO AN ENHANCED SERVICE PROVIDER, INCLUDING AN INTERNET SERVICE PROVIDER ("ISP")?

Q. PLEASE DESCRIBE THE DISPUTE ON THIS ISSUE.

A. Adelphia argues that parties should compensate one another at the reciprocal compensation rate for ISP-bound traffic, just like any other local call. BellSouth argues that traffic originating from or terminating to an enhanced service provider, including an ISP, is not local traffic

and should not be subject to reciprocal compensation. Indeed, BellSouth recommends in Attachment 3 that CLECs be required to identify all ISP-bound traffic and submit the results to BellSouth so that BellSouth can charge CLECs switched access charges for such calls.

Q. IS IT IN THE PUBLIC INTEREST TO BREAK-OUT SUCH ISP-BOUND CALLS FROM THE UNIVERSE OF LOCAL CALLS?

A. No. There are several reasons why the Commission should not establish a separate class of service for ISP-bound traffic. Dial-up Internet traffic uses the same public switched network facilities used by other local calls. Likewise, the costs to carry this traffic are largely identical to other local calls exhibiting similar calling characteristics (i.e., time of day, duration, etc.). Hence, to segregate ISP-bound traffic from the larger population of local-billed calls (thereby separating it from some group of calls that largely match its calling characteristics, and costs) provides an artificial distinction between two types of traffic that are actually very similar.

Q. HAS THE FCC SAID ANYTHING ABOUT RATE SETTING BASED ON CLASSES OF CUSTOMERS?

A. Yes. FCC Rule 51.503 (c) states: "The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide." To do so would be to discriminate against a particular class of customers or type of service being

provided, based on something other than cost. Such discrimination is not in the public interest.

Q. WILL CREATION OF THIS ARTIFICIAL DISTINCTION HARM THE PUBLIC INTEREST?

A. Yes. Artificially distinguishing between these two types of calls (*i.e.*, ISP-bound calls and other local calls) skews the resource allocation decisions of the consumer, residential and business alike. Specifically, it skews the consumer's economic decision-making as to what level of each type of call to consume (*i.e.*, if prices for Internet-bound calling are higher than for other types of local calling, the consumer will undoubtedly suppress his/her demand for Internet calling in comparison to the level demanded absent such a price differentiation). For example, under BellSouth's proposal, a customer who makes a large number of local voice calls (or calls of longer than average length) will pay less than a customer who uses the same level of local usage for accessing the Internet. Obviously, under a situation like that described above, even though both customers consume the same level of local calling resources and generate equal costs on the network, the Internet subscriber will be required to pay more. This is problematic in that it provides consumption incentives that do not match the economically efficient incentives that would result from pricing identical or similar services at the same rate.

Q. CAN YOU EXPLAIN IN GREATER DETAIL YOUR CONCERN REGARDING A SEPARATE CLASS OF SERVICE FOR ISP-BOUND TRAFFIC?

A. My primary concern in this area is that this approach doesn't encourage efficient decision-making on the part of local callers. This results from the fact that even though both voice-grade local calling and calls to the Internet use the same network in almost exactly the same way (thereby generating largely identical costs), local callers would be faced with two different pricing structures for these two identical or similar types of calling. If the Commission were to introduce such a pricing structure, it would arbitrarily distinguish between two types of traffic that are largely identical. For example, one hour of local calling from your computer to the Internet generates exactly the same level of cost on the network as does one hour of calling from your home to your best friend who may live across town. Efficient economic results are generated when consumers are faced with the marginal costs of their decisions. Only when consumers are faced with a situation where the more local calling resources they use the more they pay (whether those be for local voice calls or Internet calling), will they ever be encouraged to make sound economic decisions with respect to how much local calling to use.

Separating ISP-bound traffic from all other types of local-billed traffic and subjecting only ISP traffic to this system will serve only to depress demand for Internet usage. At the same time, allowing voice grade traffic to remain under the same pricing structure it currently enjoys will result in an incentive to "over-use" voice grade local calling. In essence, the Commission would be using its regulatory authority to favor one type of local-billed traffic (voice traffic) over another type of local-billed traffic (ISP-bound traffic). This

would undoubtedly cause market distortions that could have long-term effects on the growth of Internet traffic and the efficient allocation of resources to South Carolina's telecommunications infrastructure. One such unfortunate result could be an increase in the gap between those consumers who can afford to use the Internet at these artificially higher rates, and those that cannot (the so called "digital divide").

Q. WOULD IT BE POSSIBLE TO SEPARATE THE ISP-BOUND CALLS FROM OTHER LOCAL CALLS?

A. It would be very difficult, imprecise and expensive to break-out ISP-bound calls from other local calls. Two separate, and equally ineffective, methods of segregating ISP-bound traffic from other local calls have been proposed to this point. First, ILECs such as BellSouth have asked that interconnecting carriers identify the specific NXX-XXXX telephone numbers that are assigned to ISP providers as dial-up access numbers. Then, the traffic that is terminated to these specified dial-in numbers would be measured and identified as ISP-bound traffic (and BellSouth would impose switched access charges on the traffic and refuse to make reciprocal compensation payments to the CLECs for carrying this traffic). Second, ILECs have argued that by measuring the average call duration (holding time) for traffic passed between two carriers, it is possible to estimate the percentage of that traffic that is bound for an ISP (ILECs generally have argued that calls longer than 15 – 20 minutes exhibit characteristics similar to ISP-bound traffic and should therefore be removed from reciprocal compensation obligations).

Q. DO YOU BELIEVE THAT EITHER OF THESE OPTIONS IS AN EFFECTIVE MECHANISM FOR "DISTINGUISHING INTERNET TRAFFIC" FROM OTHER TYPES OF LOCAL TRAFFIC?

A. No. First, there is no technical or economic distinction between ISP-bound traffic and other types of local traffic, other than the fact that ISP-bound calls generally tend to have longer holding times than do average local calls (and, dial-up ISP-bound calls typically take place in the evening whereas the majority of voice calls occur during the business day). To isolate traffic that originates to a given customer group and contend that the network costs associated with switching traffic to that customer group differ substantially from all other traffic on the network is nonsensical. All of the traffic passed between BellSouth and Adelphia shares the same network, uses the same trunk groups and the same switch. Likewise, a minute of use accommodated by that singular network requires the same network capacity (both switching capacity and trunking capacity) as any other minute, regardless of where either minute of use is ultimately destined (i.e., whichever customer or customer group it ultimately terminates to, or originates from). There is no sound economic basis upon which to suggest that a minute of use destined for a barbershop versus a minute of use destined for an ISP generates any difference in network costs. Indeed, the network is oblivious and unconcerned with the subscriber type to which telephone call is terminated. Hence, distinguishing between these two types of calls is an artificial distinction that can lead to poor rate design and consumption decisions.

Further, both methods described above for purposes of distinguishing between ISP-bound calls and other types of local traffic have major shortcomings. The first method (i.e., identifying ISP dial-in numbers) requires a carrier to maintain separate records of the telephone numbers used by its ISP customers for dial-up capability. Further, a system would need to be designed to identify and measure the traffic for these numbers. Developing and managing these new systems, if possible, would be time consuming and expensive. Further, this ILEC attempt to identify the phone numbers of CLECs' ISP customers is potentially anti-competitive. Forcing CLECs to provide customer information to the ILEC, gives the ILEC key information about competitors and their customers. Taken to its logical conclusion, then, the ILEC position is to strip away CLEC compensation for the cost of serving ISP customers, while at the same time using the identification of ISP telephone numbers as a tool to market ILEC services to these same customers.

To the extent an ISP customer regularly expands or changes the dial-up numbers it uses for this purpose (many ISPs may have hundreds of dial-up numbers), it becomes difficult – not to mention the ongoing expense – to ensure that all such numbers are captured effectively and/or that only dial-in numbers are identified (as opposed to numbers used by the ISP for its own business uses). The ISP number database would need to be updated on a real-time basis – a costly and time consuming process.

The shortcomings of the second alternative described above are even worse. Simply assuming that calls of greater than 15-20 minutes (or even 25-30 minutes) are dial-up calls to the Internet is, by definition, going to provide inaccurate results. (Going beyond voice calls, think for example of the corporate LAN, where a customer dials in but does not go to the Internet. The telecommuter could be dialed in all day to her office, but never reach the Internet. In that case, such a call would show up as ISP-bound notwithstanding the actual destination.) Obviously, a good number of local voice calls (and other non-Internet calls) last longer than 15-30 minutes. Calls on Mother's Day, calls to and from teenagers after school and conference calls (video or voice) are examples of calls that tend to be longer than average. Under the second approach above, however, any call with duration greater than 15-30 minutes is generally considered to be an ISP-bound call. Using the second method generally tends to overestimate the volume of ISP-bound calls and underestimate the volume of other local calling on the network.

Q. PLEASE SUMMARIZE YOUR POSITION ON BREAKING OUT ISP-BOUND CALLS AND APPLYING SWITCHED ACCESS CHARGES TO SUCH TRAFFIC.

A. As shown above, it is not technically feasible to identify "ISP-bound" traffic. Nor is it necessary, since such calls impose absolutely no additional costs on BellSouth. Applying access charges to local calls is completely inconsistent with the reciprocal compensation requirements I described earlier in this

testimony. Further, the FCC has rejected arguments by the ILECs to impose access charges on ISPs. Specifically, in its *First Report and Order* in CC Docket No. 96-262 (Access Charge Reform), released May 16, 1997, the FCC stated as follows when rejecting ILEC attempts to remove the highly touted "ESP Exemption" currently in place for ISP end users:

> 346. We also are not convinced that the nonassessment of access charges results in ISP's imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to consumers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators. [emphasis added]

As such, it is not in the public interest to impose access charges on ISPs. Access rates do not reflect the costs imposed on the network by ISPs, and the ESP exemption – which has been in effect for almost 17 years – specifically prohibits imposing such charges on ISPs.

Q. HOW DOES BELLSOUTH'S REFUSAL TO PAY RECIPROCAL COMPENSATION IMPACT ADELPHIA AND OTHER CLECS?

A. Adelphia has been successful in attracting ISP providers and other customers requiring advanced telecommunications services to its network. BellSouth's attempt to exclude these types of local customers from reciprocal compensation obligations unfairly targets Adelphia's customer base and threatens to leave Adelphia in the untenable position of delivering a large

number of calls, originated by BellSouth customers, without any payment from BellSouth. In essence, Adelphia is being asked to carry large volumes of BellSouth traffic without any ability to charge BellSouth for its carriage.

Q. DO YOU HAVE ANY IDEA WHY ADELPHIA AND BELLSOUTH HAVE NOT BEEN ABLE TO REACH CONSENSUS ON THIS ISSUE?

A. While I would never suggest to speak for BellSouth as to why it finds this issue to be of such importance, I think it is safe to say that BellSouth is oftentimes a "net payor" of reciprocal compensation. This is due primarily to the fact that CLECs appear to be more successful in attracting ISP providers to their local service offerings than BellSouth has been in retaining them. Consider that although the vast majority of services and prices included in an interconnection agreement between BellSouth and a CLEC govern the rates, terms and conditions by which the CLEC will pay BellSouth for service, this is one area where BellSouth may actually, in some circumstances, be required to pay the CLEC for services the CLEC provides to BellSouth. It is likely for that reason that BellSouth is acutely interested in the rates that will be paid for reciprocal compensation and the terms and conditions under which they will be assessed.

Q. HASN'T THE FCC AND THE COMMISSION ALREADY ADDRESSED THIS ISSUE?

A. Yes. The FCC issued the *ISP Order* in CC Docket No. 96-98 on February 26, 1999, and the Commission in the ITC Deltacom arbitration, Docket No. 1999-259-C (Order No. 1999-690), also addressed the nature of ISP-bound traffic.

However, several aspects of those decisions must be noted. First, the FCC decision no longer stands. On March 24, 2000, the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's Declaratory Ruling in CC Docket No. 96-98. *Bell Atlantic v. FCC*, Case No. 99-1094 (D.C. Cir.). Second, while the FCC had stated at paragraph 18 of its *ISP Order* that "a substantial portion of Internet traffic involves accessing interstate or foreign websites," the FCC clarified its position with respect to the intercarrier compensation of ISP calls at paragraph 25:

> Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the Local Competition Order, state commission authority over interconnection agreements pursuant to section 252 "extends to both interstate and intrastate matters." Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the Commission has not adopted a specific rule governing the matter, we do note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic. [emphasis added, footnotes removed]

Thus, even if one overlooks the fact that the FCC's *ISP Order* has been vacated, the text of that order would have supported a decision that reciprocal compensation is owed for ISP-bound traffic.

As to the Commission's decision that ISP-bound traffic is non-local interstate traffic, that decision was based in large part on the FCC's declaratory order, which, as noted above, has been reversed by the District Court for the District of Columbia. In light of the changes in the legal and regulatory framework which have occurred since the Commission decision in the ITC Deltacom case, Adelphia urges the Commission to revisit this issue and determine that no reasonable basis exists to treat ISP-bound traffic in a manner different than other local traffic for purposes of applying reciprocal compensation.

Q. PLEASE EXPLAIN WHY SOUND PUBLIC POLICY AND ECONOMIC REASONING SUPPORT RECIPROCAL COMPENSATION PAYMENTS FOR ISP-BOUND TRAFFIC.

A. The Commission's decisions in this regard will have a substantial impact on the Internet marketplace and the investment required to realize the potential of electronic communication and e-commerce as a whole. The list below provides an overview of the public policy and economic rationales that support requiring payments for ISP-bound traffic *via* the application of transport and termination charges (*i.e.* reciprocal compensation):

(a) ISP providers are an important market segment for all carriers – both CLECs and ILECs – and making it more costly to serve them is likely to distort one of the only local exchange market segments that appears to be well on its way toward effective competition. ISPs have been drawn to CLECs like Adelphia in large part because these CLECs have been more willing, and often-times, more able, to meet their unique service needs such as collocation of facilities and short provisioning intervals. Allowing ILECs to direct calls to the ISPs by using the CLEC network without paying anything for its use penalizes the CLEC for

attracting customers *via* innovative and customer service focused products.

(b) Despite complex legal arguments and historical definitions, the simple fact remains that calls directed to ISPs are functionally identical to local voice calls for which BellSouth agrees to pay termination charges. Applying different termination rates or, even worse, compensating a carrier for one type of call and not for the other, will generate inaccurate economic signals in the marketplace, the result of which will drive firms away from serving ISPs. This result could have a dire impact on the growing electronic communication and e-commerce markets.

(c) Requiring carriers to pay reciprocal compensation rates for the termination of ISP-bound traffic is economically efficient. Indeed, because termination rates must be based upon the incumbent's underlying costs, BellSouth should be economically indifferent as to whether it incurs the cost to terminate the call on its own network or whether it incurs that cost through a reciprocal compensation rate paid to Adelphia. The fact that BellSouth is not economically indifferent stems from its incentive to impede Adelphia's entry into the marketplace instead of an incentive to be as efficient as possible in terminating its traffic.

(d) Because BellSouth is required to pay, as well as receive, symmetrical compensation for local exchange traffic based upon its own reported costs, its payments to other carriers in this regard are an important check on BellSouth's cost studies used to establish rates for the termination of traffic. Unless BellSouth is required to pay the costs that it has established *via* its own cost studies, it has every incentive to over-estimate those costs for purposes of raising barriers to competitive entry. By removing large traffic volume categories such as ISP-bound traffic from BellSouth's obligation to pay terminating costs, the Commission would be removing an important disciplining factor associated with ensuring that BellSouth's reported termination costs are reasonable.

Q. PLEASE EXPLAIN IN GREATER DETAIL YOUR CONTENTION THAT BECAUSE ISP PROVIDERS ARE AN IMPORTANT MARKET SEGMENT FOR CLECS, ELIMINATING A CLEC'S ABILITY TO RECOVER COSTS ASSOCIATED WITH SERVING THEM IS LIKELY TO DISTORT THE MARKET.

A. Transitionally competitive markets, like the local exchange market, have shown that new entrants are usually most successful in attracting customers that (1) are unsatisfied with the services or quality offered by the incumbent, (2) have technological, capacity or other specific requirements that are not easily met by the incumbent's oftentimes inflexible service offerings, and/or (3) don't have a long history of taking service from the incumbent. ISP providers fall directly into all three of these categories as many of them have been unable to reach agreement with ILECs in areas such as pricing for high capacity lines, provisioning intervals, collocation of their equipment in ILEC central offices or even in some circumstances, the ability to purchase service in sufficient quantity to meet their own end-user customer demands. Likewise, most ISP organizations are fairly new and have begun their enterprise at a time when competitive alternatives for local exchange services are available. Hence, it is reasonable to expect that these types of businesses are less restricted by long term or volume agreements, a long business relationship or other circumstances that often breed loyalty to the incumbent. The fact that these customers are far more likely to explore competitive opportunities than more traditional residential and/or business customers has made them an extremely important customer base for CLECs.

Likewise, CLECs, like Adelphia, because of their new track record and non-existent customer base in new markets, are naturally more likely to serve customers that require services specifically tailored to their strengths (*i.e.* customer service, new technology deployment and substantial spare

capacity). Given these characteristics, ISP providers and CLECs are effectively "made for one another" and ISPs have flocked to new entrant CLECs in increasing numbers. Likewise, CLECs have worked with ISPs to design new and innovative services and have provided ISPs the capacity they need to meet their customers' increasing demands.

Q. IS THE LIKELIHOOD THAT CLECS SERVE ISPS IN GREATER PROPORTION THAN A MATURE INCUMBENT LIKE BELLSOUTH THE RESULT OF A MARKET FAILURE?

A. Not at all. The relationships between CLECs and ISPs, as described above, are the direct result of how a competitive market is meant to work. Carriers who are unwilling to meet the demands of their customers, lose those customers to carriers who are more accommodating. Carriers who are attempting to build market share tend to be more accommodating than carriers who are attempting to merely keep market share. Likewise, carriers who provide customer focused services and supply the capacity required to meet their customers' demands are rewarded. The fact that relatively new customers who require specific technological support have embraced new CLECs is one of the most promising outcomes of the local exchange market's transition to competition. Indeed, ISPs and other technologically reliant customer groups are, in many cases, providing the revenue and growth potential that will fund further CLEC expansion into other more traditional residential and business markets.

Q. IF THE COMPETITIVE MARKETPLACE FOR ISP CUSTOMERS APPEARS TO BE WORKING WELL, WHY IS ADELPHIA ASKING THE COMMISSION FOR ITS ASSISTANCE IN THIS ARBITRATION?

A. Within the interconnection agreement at issue in this proceeding, BellSouth is refusing to pay going forward, under the new contract, for traffic that originates on its network and is directed to a local ISP customer served by Adelphia. Simply put, BellSouth is asking through its proposed contract language that Adelphia provide its facilities for the use of BellSouth's customers without compensation. Traffic originated on the BellSouth network and directed to Adelphia's local ISP customers is no different than other types of traffic for which BellSouth has agreed to provide reciprocal compensation. Given this, and the fact that Adelphia has agreed to pay BellSouth for traffic originating on the Adelphia network and directed to a BellSouth local ISP, the Commission should require BellSouth to compensate Adelphia for transporting and terminating such calls.

Q. EARLIER YOU MENTIONED THAT ALLOWING BELLSOUTH TO ABROGATE ITS OBLIGATION TO COMPENSATE ADELPHIA FOR TRAFFIC DIRECTED TO ITS LOCAL ISP CUSTOMERS WOULD DISTORT ONE OF THE ONLY LOCAL EXCHANGE MARKET SEGMENTS THAT APPEARS TO BE WELL ON ITS WAY TOWARD EFFECTIVE COMPETITION. CAN YOU EXPLAIN THIS CONCEPT IN GREATER DETAIL?

A. Yes. As I described above, CLECs have been more successful in attracting a number of ISP customers because they have offered those customers innovations and reasonably priced advanced services at a level of customer care that BellSouth was unable or unwilling to provide. As such, BellSouth has lost a number of these customers to Adelphia and other CLECs, resulting in this particular market segment exhibiting some of the most competitive characteristics of any segment in the local market.

It is no coincidence that BellSouth wishes to avoid paying reciprocal compensation going forward for calls directed to this particular customer group. If BellSouth can successfully remove itself from an obligation to compensate CLECs for calls directed to their ISP customers, it will have accomplished two tasks inimical to the competitive marketplace.

First, BellSouth will have succeeded in branding ISP customers as "unattractive" customers from a local provider's standpoint because ISP customers will generate costs for their local service provider without providing any reciprocal compensation revenues. By branding ISP customers as unattractive customers, BellSouth will have significantly diminished the hard-earned victories made by its competitor CLECs.

Second, a failure to provide any reciprocal compensation revenues associated with the function of transporting and terminating traffic to ISPs could disrupt the ISP marketplace. If CLECs need to raise prices to ISPs because BellSouth does not pay for call termination, this is likely to send many ISPs back to BellSouth where its vastly larger customer base can be

used to offset the costs of terminating the ISPs' traffic without raising ISP local rates. Further, if their local exchange rates are increasing, ISPs who do not return to BellSouth would have little choice but to raise the rates charged to their individual end users. This will in turn make BellSouth's ISP retail service more attractive to individual end users, further stifling competition in the ISP market.

All of these circumstances are disruptions to a competitive segment of the local exchange marketplace that seems to be operating more effectively than most other more traditional segments. The fact that each of these disruptions happens to benefit BellSouth should not be lost on the Commission when it considers BellSouth's rationale for refusing to pay reciprocal compensation for ISP bound traffic.

Q. WOULD THERE BE ANY NEGATIVE ECONOMIC CONSEQUENCES FROM ALLOWING BELLSOUTH TO PAY NOTHING FOR CALLS DIRECTED TO ISPS YET PAY A HIGHER RATE FOR ALL OTHER CALLS?

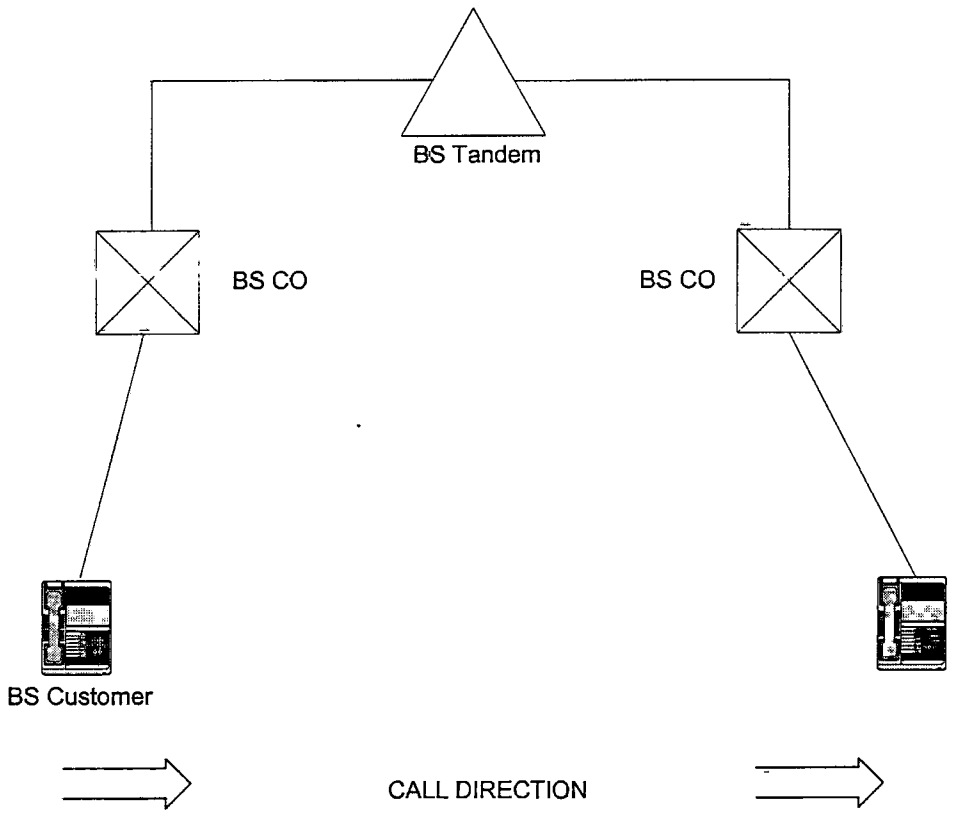
A. Of course. Given the option of receiving compensation for carrying a non-ISP call and nothing for carrying an ISP call, any reasonable carrier would fill its switch with non-ISP calls to the extent possible.. Likewise, any carrier that currently served a larger proportion of ISP customers would be a less profitable network than a network that served a smaller proportion of ISP customers. In effect, allowing BellSouth to skirt its obligation to pay for the use of an interconnecting carrier's network to terminate its local customers'

calls to ISP providers will skew the supply substitutability of ISP services versus other local services, thereby making other local exchange services relatively more attractive production alternatives. This may in turn raise ISP prices in relation to other local exchange services thereby impairing an ISP's ability to receive services at rates comparable to other local end users. Not only is this in direct conflict with the FCC's intentions with respect to offering ISPs an access charge exemption so as to place them on a level playing field with other local customers, it also is likely, all else being equal, to suppress ISP communication demand versus other types of non-ISP communication. See *ISP Order* at paragraph 20. This price discrimination effect will mean electronic communication and e-commerce demand will undoubtedly grow at a slower pace than if there were no discrimination. Any difference between the unrestricted growth of electronic communication and the suppressed growth caused by the uneconomic price discrimination described above would result in a net welfare loss due to the inefficient market consequences of BellSouth's failure to pay reciprocal compensation rates.

Q. PLEASE EXPLAIN IN MORE DETAIL YOUR CONTENTION THAT BECAUSE TERMINATION RATES MUST BE BASED UPON THEIR UNDERLYING COSTS, BELLSOUTH SHOULD BE ECONOMICALLY INDIFFERENT AS TO WHETHER IT INCURS THE COST TO TERMINATE THE CALL ON ITS OWN NETWORK OR WHETHER IT INCURS THAT COST THROUGH A RECIPROCAL COMPENSATION RATE PAID TO ADELPHIA.

A. Assume that a BellSouth customer calls another BellSouth customer within the same local calling area, as illustrated in Diagram 3.

DIAGRAM 3



The call will travel a similar path to the case described above in which a BellSouth customer is dialing a customer served by Adelphia or another CLEC, except that both end offices will now be owned by BellSouth.

In such a circumstance, BellSouth incurs costs associated with originating, transporting and terminating the call for which it is paid, by its originating customer, a local usage fee (either a flat fee per month or a per message or per minute charge, or both).

When compared to the scenario discussed above, in which the terminating customer is served by Adelphia or another CLEC, it is easy to see

that the only difference between a call made between two BellSouth local customers and the call made from a BellSouth customer to an Adelphia customer is that the Adelphia network provides the terminating transport and switching function that was originally performed by the BellSouth network. In this way, BellSouth avoids those costs of terminating the call. Hence, if BellSouth has accurately established its terminating reciprocal compensation rate based upon its own costs of terminating a call, it should be economically indifferent with respect to whether a call both originates or terminates on its own network or whether a call terminates on the Adelphia network. BellSouth will either incur the terminating cost via its own switch or it will incur that cost via a cost-based rate paid to Adelphia for performing the termination function. Either way, the extent to which a particular call is directed to a particular kind of customer is irrelevant to the economics and engineering of the call.

Q. WHY IS THIS POINT CRITICAL TO UNDERSTANDING THE DISPUTE REGARDING PAYMENT FOR ISP-BOUND TRAFFIC AT ISSUE IN THIS PROCEEDING?

A. This point is critical for two reasons. First, assume that neither Adelphia nor any other CLEC existed and that BellSouth provides local services to 100 percent of the customer base. Assume further that ISP traffic is occurring at today's levels with future growth expected to be even greater. In such a circumstance, BellSouth would be responsible not only for originating every call but also for terminating every call, including calls made to ISP providers. BellSouth would undoubtedly need to reinforce its network to accommodate

the additional capacity requirements associated with this increase in traffic. It is highly unlikely under such a circumstance that BellSouth would be arguing that terminating traffic to an ISP provider should be done for free. However, that is exactly what BellSouth is asking this Commission to do in this case.

The arbitration issue before the Commission differs from our hypothetical above in that instead of only BellSouth investing in its network to meet the capacity requirements of the traffic volume increases that have occurred over the past few years, new entrants like Adelphia have also invested capital and have deployed their own switching capacity to accommodate this growth. Likewise, as BellSouth would have undoubtedly argued in our hypothetical above that it should be compensated for its additional investment to meet this growth, CLECs should also be compensated for terminating that traffic such that their investments can be recovered.

The second reason is of paramount importance because it is at the heart of the dispute between the parties in this case. As I have shown above, BellSouth should be indifferent as to whether it terminates the traffic or it avoids the costs of termination and pays someone else, namely a CLEC, to do so. Yet we know that BellSouth is not indifferent because it has refused to agree to such a compensation framework as part of the new interconnection agreement. The question is: Why? The answer lies in one of two reasons. Either (1) BellSouth's current rate for call termination is not representative of its actual underlying costs and it realizes that paying an CLEC for terminating

traffic actually makes it economically "worse off" than terminating the traffic itself, or (2) it has a competitive interest in not providing a cost recovery mechanism for its competitors regardless of the extent to which it is economically indifferent on any given call.

Q. DO YOU BELIEVE THAT EITHER OF YOUR SCENARIOS ABOVE IS LIKELY TO BE AT THE ROOT OF BELLSOUTH'S REFUSAL TO PAY COMPENSATION FOR CALLS DIRECTED TO ISP PROVIDERS SERVED BY AN CLEC?

A. Obviously, I can't speak to what motivates BellSouth's position in this respect. However, I can speak to the economic incentives that are at work in the local exchange marketplace and how participants within that marketplace react to them. And, in this case, it would make sense that any ILEC has an incentive (though an incentive steeped in self-interest) to avoid payment for traffic directed to an ISP served by a CLEC for both of the reasons described above.

Q. IN COMMENTS TO THE FCC, AND IN A NUMBER OF OTHER DOCUMENTS, ILECS HAVE ARGUED THAT IT IS UNFAIR TO FORCE THEM TO PAY CLECS FOR TERMINATING TRAFFIC TO ISPS WHEN THEY ARE UNABLE TO RECOVER THOSE RECIPROCAL COMPENSATION PAYMENTS EITHER THROUGH ACCESS CHARGES ASSESSED ON THE ISP OR FOR USAGE CHARGES ASSESSED TO THEIR OWN LOCAL CUSTOMERS. DO YOU HAVE ANY COMMENTS REGARDING THIS ISSUE?

A. Yes, I do. First, I've already discussed the fact that calls to ISPs are really indistinguishable from calls to any other local customer. Hence, the fact that a call is directed to an ISP or to any other kind of customer is irrelevant to this argument. This argument does not support BellSouth's position that it will pay termination charges for calls made to certain customers yet not for calls directed to a business customer who happens to be an ISP provider.

Second, however, there seems to be some indication in this argument that CLECs are to blame for the increased costs the ILECs contend they are facing in meeting calling volume requirements associated with electronic communication and e-commerce. This simply isn't accurate. It is the public's seemingly unquenchable thirst for Internet access and other electronic communications media that have caused the increased calling volumes that generate costs associated with carrying local traffic to the Internet. And, it is important to note that companies like BellSouth are on the front lines marketing these services to feed the public's demand.

Q. PLEASE SUMMARIZE ADELPHIA'S POSITION ON ISSUE 4.

A. Reciprocal compensation is required under the 1996 Act and the FCC rules. BellSouth's proposal would result in Adelphia carrying large volumes of BellSouth traffic without any compensation. This position is inconsistent and anti-competitive. BellSouth has agreed to pay reciprocal compensation for local calls dialed to an CLEC residential or business customer. Consistent with public policy and economic objectives, BellSouth should also pay Adelphia reciprocal compensation for calls to those customers who happen to

be ISPs. Charging different rates for what are identical types of calls would result in significant negative impacts in the market place and to BellSouth's competitors. Further, the FCC has enforced the ESP exemption such that enhanced service providers, including ISPs, should not pay access charges. BellSouth should not be allowed to avoid reciprocal compensation for these calls as it would result in CLECs carrying calls originated by BellSouth customers without any compensation. Finally, BellSouth has failed to show why calls to ISPs should be treated any differently from other local calls.

ISSUE 5 – IS BELLSOUTH REQUIRED TO PAY TANDEM CHARGES WHEN ADELPHIA TERMINATES BELLSOUTH LOCAL TRAFFIC USING A SWITCH SERVING AN AREA COMPARABLE TO A BELLSOUTH TANDEM?

Q. WHAT IS THE PROPER STANDARD TO WHICH ADELPHIA SHOULD BE HELD FOR PURPOSES OF ASSESSING A RATE EQUAL TO BELLSOUTH'S TANDEM TERMINATION RATE?

A. FCC Rule 51.711(a)(3) establishes the proper standard to which Adelphia or any other CLEC should be held for purposes of assessing a tandem termination rate. Rule 51.711(a)(3) states as follows:

§51.711 Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c).

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem inter-connection rate.

Q. PLEASE ELABORATE ON THE SINGLE CRITERION THAT MUST BE MET BEFORE A CLEC CAN CHARGE A TANDEM TERMINATION RATE.

A. It is obvious from rule 51.711(a) that the FCC has established a single criterion that if met, would allow a CLEC to charge the tandem termination rate. That is, "where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent

LEC's tandem switch." Therefore, pursuant to rule 51.711(a), if Adelphia or another CLEC's switch serves a geographic area "comparable" to the area served by the incumbent LEC's tandem switch, then the appropriate rate of compensation to be charged by the CLEC is the ILEC's tandem inter-connection rate.

Q. BELLSOUTH ARGUES THAT IF ADELPHIA'S SWITCH IS NOT UTILIZED IN PRECISELY THE SAME MANNER AS BELLSOUTH'S TANDEM, THEN ADELPHIA SHOULD NOT BE COMPENSATED AT THE TANDEM RATE. PLEASE COMMENT.

A. BellSouth appears to rely upon a paragraph in the FCC's *Local Competition Order* to support its flawed position. Paragraph 1090 of that order states as follows:

> 1090. We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending upon whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to an end-office switch. In such event, states shall also consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate. [emphasis added]

Q. IN YOUR OPINION DOES THIS PARAGRAPH REQUIRE CARRIERS LIKE ADELPHIA TO PROVE THAT THEIR SWITCHES SERVE SIMILAR FUNCTIONS TO THOSE PERFORMED BY AN INCUMBENT'S TANDEM SWITCH?

A. No, it does not. The last sentence of this paragraph couldn't be clearer, especially when read in combination with the language the FCC ultimately decided upon for purposes of codifying this section of its order in its rules (the language as shown above in Rule 51.711). That is, it is clear that "where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate" (i.e. comparable geographic coverage).

Q. ARE YOU EXPRESSING AN OPINION AS TO WHETHER ADELPHIA'S SWITCH SERVES A GEOGRAPHIC AREA COMPARABLE TO THAT OF BELLSOUTH'S TANDEM?

A. No. It is my understanding that Adelphia does not wish to make such a showing in this proceeding while it is in the initial stages of its network deployment. Rather, Adelphia wishes to preserve its ability to make such a showing under the agreement at a later date.

ISSUE 6 – HOW SHOULD THE PARTIES DEFINE THE POINTS OF INTERFACE FOR THEIR NETWORKS?

Q. PLEASE SUMMARIZE THE DISPUTE BETWEEN THE PARTIES ON THIS ISSUE.

A. In its Reply to Adelphia's Arbitration Petition, BellSouth introduces a new Issue 6, asserting that BellSouth should be permitted to unilaterally designate its own POIs for BellSouth-originated traffic. Adelphia argues that the flexibility that BellSouth seeks has no foundation in the Act or the FCC orders implementing the Act. Further, such authority would enable BellSouth to impose additional costs and network inefficiencies on Adelphia. Under its proposal, BellSouth could designate additional POIs, thereby imposing additional costs on Adelphia, even when network utilization levels do not justify the designation of additional Points of Interface.

Q. PLEASE DEFINE A POI.

A. The point of interface ("POI") is the physical interconnection of the trunk groups provided by each party for the transport and termination of local telephone calls between their respective networks. The POI serves as the demarcation point for the financial and operational responsibility for handling calls.

Q. HOW DO NEW ENTRANTS SUCH AS ADELPHIA, DEPLOY OR ESTABLISH POIS?

A. The location and number of POIs is a financial and engineering issue, because each carrier needs to install transmission facilities and equipment to deliver its originating traffic to each POI, and to receive terminating traffic there. Of course, BellSouth already has a ubiquitous network throughout much of South Carolina and can use its existing facilities for these purposes. On the other hand, Adelphia, as a new entrant, must construct (or lease or acquire) entirely new facilities for access to each POI. Therefore, this issue has competitive implications as well.

The ILEC should not be permitted to impose interconnection requirements on CLECs that require CLECs to duplicate the ILEC's legacy network architecture. Rather, new entrants should be free to deploy least cost, forward-looking technology, such as the combination of a single switching entity with a SONET ring to serve an area that the ILEC may serve through a hub-and-spoke, switch-intensive architecture. Initial interconnection at the tandem level and at a single POI per LATA is crucial to providing new entrants this flexibility. For a new entrant to begin service, it requires a single connection capable of handling all of its calls, including local, toll, and access traffic. Adelphia agrees that sound engineering principles may eventually dictate that Adelphia add new POIs at other BellSouth switches.

Q. DO CLECS HAVE THE RIGHT TO DESIGNATE A SINGLE POI PER LATA?

A. Yes. Section 251(c)(2) of the Act requires ILECs such as BellSouth "...to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange network...(B) at any technically feasible point within the carrier's network.". For example, one can look to the recent FCC order approving Southwestern Bell's entry into the Texas long distance market. In that order, the FCC stated, "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA." See FCC 271 Order in SBC Proceeding in Texas – CC Docket No. 00-65; Released June 30, 2000 at paragraph 78.

Q. HAS THE FCC SUPPORTED ADELPHIA'S POSITION THAT IT HAS THE RIGHT TO CHOOSE POIS?

A. Yes. In its Local Competition Order, the FCC has found that Section 251(c)(2) grants competing carriers such as Adelphia the right to choose the POI. See FIRST REPORT AND ORDER, CC Docket No. 96-98 and CC Docket No. 95-185; Released August 8, 1996. At paragraph 172 of the Local Competition Order the FCC notes that the interconnection obligations of this section of the Act, ". . . allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carrier's cost of, among other things, transport and

termination of traffic." In that same order at paragraph 220 (note 464) the FCC states, "Of course, requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under Section 251(c)(2)."

The FCC submitted an amicus curiae brief on this very point in an interconnection appeal before the United States District Court for the District of Colorado. In AT&T Communications of the Mountain States, Inc. v. Robert J. Hix, et al., Civil Action No. 97-D-152, the FCC stated: "Neither the 1996 Act nor binding FCC regulations allow the incumbent LEC or the PUC to impose interconnection at any particular point in the LEC's network. Provided that such interconnection is technically feasible, only the new entrant has the right to designate where interconnection should take place. . . ." (Memorandum of the Federal Communications Commission as Amicus Curiae, pp. 14-15, submitted March 3, 1998). Exhibit A.

Q. DO ILECS SUCH AS BELLSOUTH HAVE THE RIGHT TO SELECT POIS?

A. No. As I discussed earlier in this testimony, that right is limited to new entrants and does not extend to ILECs. The FCC explained, in part, why this right is provided to the CLECs and not to the ILECs at paragraph 218 of the Local Competition Order, wherein it states, "Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself."

Q. MIGHT BELLSOUTH USE THE ABILITY TO ESTABLISH POIS TO IMPEDE COMPETITION?

A. Yes, it might. The FCC recognized that one of the goals of competition was to eliminate this ILEC ability. At paragraph four of the Local Competition Order the FCC states:

> Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of local services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including the Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold.

It is clear that CLECs such as Adelphia do not have the ability – by virtue of existing bottleneck facilities – to impede free market competition. Indeed, companies such as Adelphia have no monopoly markets or captive customers that would give them market power sufficient to harm the public interest. It is for that reason, that CLECs have the right to designate POIs, but ILECs such as BellSouth do not.

Q. ARE THERE PUBLIC POLICY REASONS TO DENY BELLSOUTH THE ABILITY TO ESTABLISH POIS FOR TRAFFIC IT ORIGINATES TO CLECS?

A. Yes. If BellSouth were allowed to identify POIs for originating traffic it would be able to disadvantage CLECs and impose additional and unwarranted costs

on new entrants. Such a result is not in the public interest and would severely impede the development of competition. Indeed, if BellSouth were allowed such discretion, it may force CLECs to essentially duplicate the incumbent's network. Such a result has been regularly rejected by regulators as not in the public interest.

BellSouth's desire to identify POIs for its originating traffic is understandable, especially given its incentives discussed above. Nevertheless, such an ability would force Adelphia to build facilities to each BellSouth local calling area or to pay BellSouth for transport of the traffic from the local calling areas to Adelphia's POI. Such a result would be inconsistent with the goals of the Local Competition Order and the Act. Adelphia is not required to extend its facilities to POIs unilaterally identified by BellSouth; instead, BellSouth is obligated to provide interconnection for Adelphia facilities at POIs designated by Adelphia.

Q. ARE THERE ANY OTHER CONCERNS THAT YOU HAVE REGARDING BELLSOUTH'S POSITION ON THIS ISSUE?

A. Yes. BellSouth's proposal to establish POIs on BellSouth's network for the aggregation of BellSouth-originated traffic reflects BellSouth's attempt to force Adelphia either to build or to lease facilities to carry BellSouth's traffic to the Adelphia network. Adelphia takes the position that each carrier is responsible, financially and operationally, to deliver traffic to the POI.

Q. SHOULD BELLSOUTH BE ABLE TO REQUIRE THAT ADELPHIA PROVISION FACILITIES TO LOCATIONS NOT ON ITS NETWORK TO FACILITATE BELLSOUTH'S INTERCONNECTION?

A. Absolutely not. Although BellSouth claims otherwise, Adelphia cannot be required to provision facilities to locations outside its network to facilitate BellSouth's interconnection. BellSouth has taken the untenable position that it may designate a POI at a central office where Adelphia has no physical presence, and thus require that Adelphia provision facilities to that point for the sole purpose of accommodating BellSouth. Adelphia simply has no such obligation. It is notable that the Telecommunications Act does not even mandate that Adelphia exert such extraordinary effort, requiring only that it interconnect "at any technically feasible point within [BellSouth's] network." If Adelphia cannot require BellSouth to interconnect at a point outside of BellSouth's network, the converse should certainly be true.

Q. WHAT IS THE SOLUTION TO THIS PROBLEM?

A. The Commission should adopt Adelphia's position.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

Qualifications of Timothy J Gates
TJG Schedule 1

Q. PLEASE DESCRIBE YOUR PROFESSIONAL EXPERIENCE.

A. Prior to my current position with QSI Consulting, I was a Senior Executive Staff Member in MCI WorldCom's ("MCIW") National Public Policy Group. In this position, I was responsible for providing public policy expertise in key cases across the country and for managing external consultants for MCIW's state public policy organization. In certain situations, I also provided testimony in regulatory and legislative proceedings.

Prior to my position with MCIW in Denver, I was an Executive Staff Member II at MCI Telecommunications ("MCI") World Headquarters in Washington D.C.. In that position I managed economists, external consultants, and provided training and policy support for regional regulatory staffs. Prior to that position I was a Senior Manager in MCI's Regulatory Analysis Department, which provided support in state regulatory and legislative matters to the various operating regions of MCI. In that position I was given responsibility for assigning resources from our group for state regulatory proceedings throughout the United States. At the same time, I prepared and presented testimony on various telecommunications issues before state regulatory and legislative bodies. I was also responsible for managing federal tariff reviews and presenting MCI's position on regulatory matters to the Federal Communications Commission. Prior to my assignment in the Regulatory Analysis Department, I was the Senior Manager of Economic Analysis and Regulatory Policy in the Legal, Regulatory and Legislative Affairs Department for the Midwest Division of MCI. In that position I developed and promoted regulatory policy within what was then a five-state operating division of MCI. I promoted MCI policy positions through negotiations, testimony and participation in industry forums.

Prior to my positions in the Midwest, I was employed as Manager of Tariffs and Economic Analysis with MCI's West Division in Denver, Colorado. In that position I was responsible for managing the development and application of MCI's tariffs in the fifteen MCI West states. I was also responsible for managing regulatory dockets and for providing economic and financial expertise in the areas of discovery and issue analysis. Prior to joining the West Division, I was a Financial Analyst III and then a Senior Staff Specialist with MCI's Southwest Division in Austin, Texas. In those positions, I was responsible for the management of regulatory dockets and liaison with outside counsel. I was also responsible for discovery, issue analysis, and for the development of working relationships with consumer and business groups. Just prior to joining MCI, I was employed by the Texas Public Utility Commission as a Telephone Rate Analyst in the Engineering Division responsible for examining telecommunications cost studies and rate structures.

I was employed as an Economic Analyst with the Public Utility Commissioner of Oregon from July, 1983 to December, 1984. In that position, I examined and analyzed cost studies and rate structures in telecommunications rate cases and investigations. I also testified in rate cases and in private and public hearings regarding telecommunications services. Before joining the Oregon Commissioner's Staff, I was employed by the Bonneville Power Administration as a Financial Analyst, where I made total regional electric use forecasts and automated the Average System Cost Review Methodology. Prior to joining the Bonneville Power Administration, I held numerous positions of increasing responsibility in areas of forest management for both public and private forestry concerns.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL CREDENTIALS.

A. I received a Bachelor of Science degree from Oregon State University and a Master of Management degree in Finance and Quantitative Methods from Willamette University's Atkinson Graduate School of Management. I have also attended numerous courses and seminars specific to the telecommunications industry, including the NARUC Annual Regulatory Studies Program.

Q. WHAT ARE YOUR CURRENT RESPONSIBILITIES?

A. Effective April 1, 2000, I joined QSI Consulting as Senior Vice President and Partner. In this position I provide analysis and testimony for QSI's many clients. The deliverables include written and oral testimony, analysis of rates, cost studies and policy positions, position papers, presentations on industry issues and training.

Q. PLEASE IDENTIFY THE JURISDICTIONS IN WHICH YOU HAVE TESTIFIED.

A. I have filed testimony or comments on telecommunications issues in Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming. I have also filed comments with the FCC and made presentations to the Department of Justice.

I have testified or presented formal comments in the following proceedings and forums:

Arizona:

September 23, 1987; Arizona Corporation Commission Workshop on Special Access Services; Comments on Behalf of MCI.

August 21, 1996; Affidavit in Opposition to USWC Motion for Partial Summary Judgment; No. CV 95-14284, No. CV-96-03355, No. CV-96-03356, (consolidated); On Behalf of MCI.

October 24, 1997; Comments to the Universal Service Fund Working Group; Docket No. R-0000-97-137; On Behalf of MCI.

May 8, 1998; Comments to the Universal Service Fund Working Group; Docket No.R-0000-97-137; On Behalf of MCI.

November 9, 1998; Docket No. T-03175A-97-0251; Application of MCImetro Access Transmission Services, Inc. to Expand It's CCN to Provide IntraLATA Services and to Determine that Its IntraLATA Services are Competitive; Direct Testimony on Behalf of MCI WorldCom, Inc.

September 20, 1999; Docket No. T-00000B-97-238; USWC OSS Workshop; Comments on Behalf of MCI WorldCom, Inc.

California:

August 30, 1996; Application No. 96-08-068; MCI Petition for Arbitration with Pacific Bell; Direct Testimony on Behalf of MCI.

September 10, 1996; Application No. 96-09-012; MCI Petition for Arbitration with GTE California, Inc.; Direct Testimony on Behalf of MCI.

June 5, 2000; Petition of Level 3 Communications for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company; Direct Testimony on Behalf of Level (3) Communications, LLC.

Colorado:

December 1, 1986; Investigation and Suspension Docket No. 1720; Rate Case of Mountain

States Telephone and Telegraph Company; Direct Testimony on Behalf of MCI.

October 26, 1988; Investigation and Suspension Docket No. 1766; Mountain States Telephone and Telegraph Company's Local Calling Access Plan; Direct Testimony of Behalf of MCI.

September 6, 1996; MCImetro Petition for Arbitration wit U S WEST Communications, Inc.; Docket No. 96A-366T (consolidated); Direct Testimony on Behalf of MCI.

September 17, 1996; MCImetro Petition for Arbitration wit U S WEST Communications, Inc.; Docket No. 96A-366T (consolidated); Rebuttal Testimony on Behalf of MCI.

September 26, 1996; Application of U S WEST Communications, Inc. To Modify Its Rate and Service Regulation Plan; Docket No. Docket No. 90A-665T (consolidated); Direct Testimony on Behalf of MCI.

October 7, 1996; Application of U S WEST Communications, Inc. To Modify Its Rate and Service Regulation Plan; Docket No. Docket No. 90A-665T (consolidated); Rebuttal Testimony on Behalf of MCI.

July 18, 1997; Complaint of MCI to Reduce USWC Access Charges to Economic Cost; Docket Nos. 97K-237T, 97F-175T (consolidated) and 97F-212T (consolidated); Direct Testimony on Behalf of MCI.

August 15, 1997; Complaint of MCI to Reduce USWC Access Charges to Economic Cost; Docket Nos. 97K-237T, 97F-175T (consolidated) and 97F-212T (consolidated); Rebuttal Testimony on Behalf of MCI.

March 10, 1998; Application of WorldCom, Inc. for Approval to Transfer Control of MCI to WorldCom, Inc.; Docket No. 97A-494T; Supplemental Direct Testimony on Behalf of MCI.

March 26, 1998; Application of WorldCom, Inc. for Approval to Transfer Control of MCI to WorldCom, Inc.; Docket No. 97A-494T; Rebuttal Testimony on Behalf of MCI.

May 8, 1998; Application of WorldCom, Inc. for Approval to Transfer Control of MCI to WorldCom, Inc.; Docket No. 97A-494T; Affidavit in Response to GTE.

November 4, 1998; Proposed Amendments to the Rules Prescribing IntraLATA Equal Access; Docket No. 98R-426T; Comments to the Commission on Behalf of MCI WorldCom and AT&T Communications of the Mountain States, Inc.

May 13, 1999; Proposed Amendments to the Rules on Local Calling Area Standards; Docket No. 99R-128T; Oral Comments before the Commissioners on Behalf of MCIW.

Delaware:

February 12, 1993; Diamond State Telephone Company's Application for a Rate Increase; Docket No. 92-47; Direct Testimony on Behalf of MCI.

Florida:

July 1, 1994; Investigation into IntraLATA Presubscription; Docket No. 930330-TP; Direct Testimony on Behalf of MCI.

Idaho:

November 20, 1987; Case No. U_1150_1; Petition of MCI for a Certificate of Public Convenience and Necessity; Direct Testimony on Behalf of MCI.

March 17, 1988; Case No. U_1500_177; Investigation of the Universal Local Access Service Tariff; Direct Testimony on Behalf of MCI.

April 26, 1988; Case No. U_1500_177; Investigation of the Universal Local Access Service Tariff; Rebuttal Testimony on Behalf of MCI.

Illinois:

January 16, 1989; Docket No. 83_0142; Appropriate Methodology for Intrastate Access Charges; Rebuttal Testimony Regarding Toll Access Denial on Behalf of MCI.

February 16, 1989; Docket No. 83_0142; Appropriate Methodology for Intrastate Access Charges; Testimony Regarding ICTC's Access Charge Proposal on Behalf of MCI.

May 3, 1989; Docket No. 89_0033; Illinois Bell Telephone Company's Rate Restructuring; Direct Testimony on Behalf of MCI.

July 14, 1989; Docket No. 89-0033; Illinois Bell Telephone Company's Rate Restructuring; Rebuttal Testimony on Behalf of MCI.

November 22, 1989; Docket No. 88-0091; IntraMSA Dialing Arrangements; Direct Testimony on Behalf of MCI.

February 9, 1990; Docket No. 88-0091; IntraMSA Dialing Arrangements; Rebuttal Testimony on Behalf of MCI.

November 19, 1990; Docket No. 83-0142; Industry presentation to the Commission re Docket No. 83-0142 and issues for next generic access docket; Comments re the Imputation Trial and Unitary Pricing/Building Blocks on Behalf of MCI.

July 29, 1991; Case No. 90-0425; Presentation to the Industry Regarding MCI's Position on Imputation.

November 18, 1993; Docket No. 93-0044; Complaint of MCI and LDDS re Illinois Bell Additional Aggregated Discount and Growth Incentive Discount Services; Direct Testimony on Behalf of MCI and LDDS.

January 10, 1994; Docket No. 93-0044; Complaint of MCI and LDDS re Illinois Bell Additional Aggregated Discount and Growth Incentive Discount Services; Rebuttal Testimony on Behalf of MCI and LDDS.

May 30, 2000; Docket No. 00-0332; Level 3 Petition for Arbitration to Establish and Interconnection Agreement with Illinois Bell Telephone Company; Direct Testimony on Behalf of Level (3) Communications, LLC.

July 11, 2000: Docket No. 00-0332; Level 3 Petition for Arbitration to Establish and Interconnection Agreement with Illinois Bell Telephone Company; Supplemental Verified Statement on Behalf of Level (3) Communications, LLC.

Indiana:

October 28, 1988; Cause No. 38561; Deregulation of Customer Specific Offerings of Indiana Telephone Companies; Direct Testimony on Behalf of MCI.

December 16, 1988; Cause No. 38561; Deregulation of Customer Specific Offerings of Indiana Telephone Companies; Direct Testimony on Behalf of MCI Regarding GTE.

April 14, 1989; Cause No. 38561; Deregulation of Customer Specific Offerings of Indiana Telephone Companies; Direct Testimony on Behalf of MCI Regarding Staff Reports.
June 21, 1989; Cause No. 37905; Intrastate Access Tariffs -- Parity with Federal Rates; Direct Testimony on Behalf of MCI.

June 29, 1989; Cause No. 38560; Reseller Complaint Regarding 1+ IntraLATA Calling; Direct Testimony on Behalf of MCI.

October 25, 1990; Cause No. 39032; MCI Request for IntraLATA Authority; Direct Testimony on Behalf of MCI.

April 4, 1991; Rebuttal Testimony in Cause No. 39032 re MCI's Request for IntraLATA Authority on Behalf of MCI.

Iowa:

September 1, 1988; Docket No. RPU 88_6; IntraLATA Competition in Iowa; Direct Testimony on Behalf of MCI.

September 20, 1988; Docket No. RPU_88_1; Regarding the Access Charges of Northwestern Bell Telephone Company; Direct Testimony on Behalf of MCI.

September 25, 1991; Docket No. RPU-91-4; Investigation of the Earnings of U S WEST Communications, Inc.; Direct Testimony on Behalf of MCI.

October 3, 1991; Docket No. NOI-90-1; Presentation on Imputation of Access Charges and the Other Costs of Providing Toll Services; On Behalf of MCI.

November 5, 1991; Docket No. RPU-91-4; Investigation of the Earnings of U S WEST Communications, Inc.; Rebuttal Testimony on Behalf of MCI.

December 23, 1991; Docket No. RPU-91-4; Investigation of the Earnings of US WEST Communications; Inc.; Supplemental Testimony on Behalf of MCI.

January 10, 1992; Docket No. RPU-91-4; Investigation of the Earnings of U S WEST Communications, Inc.; Rebuttal Testimony on Behalf of MCI.

January 20, 1992; Docket No. RPU-91-4; Investigation of the Earnings of U S WEST Communications, Inc.; Surrebuttal Testimony on Behalf of MCI.

June 8, 1999; Docket NOI-99-1; Universal Service Workshop; Participated on numerous panels during two day workshop; Comments on Behalf of MCIW.

October 27, 1999: Docket NOI-99-1; Universal Service Workshop; Responded to questions posed by the Staff of the Board during one day workshop; Comments on Behalf of MCIW and AT&T.

Kansas:

June 10, 1992; Docket No. 181,097-U; General Investigation into IntraLATA Competition within the State of Kansas; Direct Testimony on Behalf of MCI.

September 16, 1992; Docket No. 181,097-U; General Investigation into IntraLATA Competition within the State of Kansas; Rebuttal Testimony on Behalf of MCI.

Kentucky:

May 20, 1993; Administrative Case No. 323, Phase I; An Inquiry into IntraLATA Toll Competition, an Appropriate Compensation Scheme for Completion of IntraLATA Calls by Interexchange Carriers, and WATS Jurisdictionality; Direct Testimony on Behalf of MCI.

Maryland:

November 12, 1993; Case No. 8585; Competitive Safeguards Required re C&P's Centrex Extend Service; Direct Testimony on Behalf of MCI.

January 14, 1994; Case No. 8585; Competitive Safeguards Required re C&P's Centrex Extend Service; Rebuttal Testimony on Behalf of MCI.

May 19, 1994; Case No. 8585; Re Bell Atlantic Maryland, Inc.'s Transmittal No. 878; Testimony on Behalf of MCI.

June 2, 1994; Case No. 8585; Competitive Safeguards Required re C&P's Centrex Extend Service; Rebuttal Testimony on Behalf of MCI.

Massachusetts:

April 22, 1993; D.P.U. 93-45; New England Telephone Implementation of Interchangeable NPAs; Direct Testimony on Behalf of MCI.

May 10, 1993; D.P.U. 93-45; New England Telephone Implementation of Interchangeable NPAs; Rebuttal Testimony on Behalf of MCI.

Michigan:

September 29, 1988; Case Nos. U_9004, U_9006, U_9007 (Consolidated); Industry Framework for IntraLATA Toll Competition; Direct Testimony on Behalf of MCI.
November 30, 1988; Case Nos. U_9004, U_9006, U_9007 (Consolidated); Industry Framework for IntraLATA Toll Competition; Rebuttal Testimony on Behalf of MCI.
June 30, 1989; Case No. U-8987; Michigan Bell Telephone Company Incentive Regulation Plan; Direct Testimony on Behalf of MCI.

July 31, 1992; Case No. U-10138; MCI v Michigan Bell and GTE re IntraLATA Equal Access; Direct Testimony on Behalf of MCI.

November 17, 1992; Case No. U-10138; MCI v Michigan Bell and GTE re IntraLATA Equal Access; Rebuttal Testimony on Behalf of MCI.

July 22, 1993; Case No. U-10138 (Reopener); MCI v Michigan Bell and GTE re IntraLATA Equal Access; Direct Testimony on Behalf of MCI.

February 16, 2000; Case No. U-12321; AT&T Communications of Michigan, Inc. Complainant v. GTE North Inc. and Contel of the South, Inc., d/b/a GTE Systems of Michigan; Direct Testimony on Behalf of AT&T. (Adopted Testimony of Michael Starkey)

May 11, 2000; Case No. U-12321; AT&T Communications of Michigan, Inc. Complainant v. GTE North Inc. and Contel of the South, Inc., d/b/a GTE Systems of Michigan; Rebuttal Testimony on Behalf of AT&T.

June 8, 2000; Case No. U-12460; Petition of Level 3 Communications for Arbitration to Establish an Interconnection Agreement with Ameritech Michigan; Direct Testimony on Behalf of Level (3) Communications, LLC.

September 27, 2000; Case No. U-12528; In the Matter of the Implementation of the Local Calling Area Provisions of the MTA; Rebuttal Testimony on Behalf of Focal Communications, Inc..

Minnesota:

January 30, 1987; Docket No. P_421/CI_86_88; Summary Investigation into Alternative Methods for Recovery of Non-traffic Sensitive Costs; Comments to the Commission on Behalf of MCI.

September 7, 1993; Docket No. P-999/CI-85-582, P-999/CI-87-697 and P-999/CI-87-695, In the Matter of an Investigation into IntraLATA Equal Access and Presubscription; Comments of MCI on the Report of the Equal Access and Presubscription Study Committee on Behalf of MCI.

September 20, 1996; Petition for Arbitration with U S WEST Communications, Inc.; Docket No. P-442, 421/M-96-855; P-5321, 421/M-96-909; and P-3167, 421/M-96-729 (consolidated); Direct Testimony on Behalf of MCI.

September 30, 1996; Petition for Arbitration with U S WEST Communications, Inc.; Docket No. P-442, 421/M-96-855; P-5321, 421/M-96-909; and P-3167, 421/M-96-729 (consolidated); Rebuttal Testimony on Behalf of MCI.

September 14-16, 1999; USWC OSS Workshop; Comments on Behalf of MCI WorldCom, Inc. re OSS Issues.

September 28, 1999; Docket No. P-999/R-97-609; Universal Service Group; Comments on Behalf of MCI WorldCom, Inc. and AT&T Communications.

Montana:

May 1, 1987; Docket No. 86.12.67; Rate Case of AT&T Communications of the Mountain States, Inc.; Direct Testimony on Behalf of MCI.

September 12, 1988; Docket No. 88.1.2; Rate Case of Mountain States Telephone and Telegraph Company; Direct Testimony on Behalf of MCI.

May 12, 1998; Docket No. D97.10.191; Application of WorldCom, Inc. for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.; Rebuttal Testimony on Behalf of MCI.

June 1, 1998; Docket No. D97.10.191; Application of WorldCom, Inc. for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.; Amended Rebuttal Testimony on Behalf of MCI.

Nebraska:

November 6, 1986; Application No. C_627; Nebraska Telephone Association Access Charge Proceeding; Direct Testimony on Behalf of MCI.

March 31, 1988; Application No. C_749; Application of United Telephone Long Distance Company of the Midwest for a Certificate of Public Convenience and Necessity; Direct Testimony on Behalf of MCI.

New Hampshire:

April 30, 1993; Docket DE 93-003; Investigation into New England Telephone's Proposal to Implement Seven Digit Dialing for Intrastate Toll Calls; Direct Testimony on Behalf of MCI.

New Jersey:

September 15, 1993; Docket No. TX93060259; Notice of Pre-Proposal re IntraLATA Competition; Comments in Response to the Board of Regulatory Commissioners on Behalf of MCI.

October 1, 1993; Docket No. TX93060259; Notice of Pre-Proposal re IntraLATA Competition; Reply Comments in Response to the Board of Regulatory Commissioners on Behalf of MCI.

April 7, 1994; Docket Nos. TX90050349, TE92111047, and TE93060211; Petitions of MCI, Sprint and AT&T for Authorization of IntraLATA Competition and Elimination of Compensation; Direct Testimony on Behalf of MCI.

April 25, 1994; Docket Nos. TX90050349, TE92111047, and TE93060211; Petitions of MCI, Sprint and AT&T for Authorization of IntraLATA Competition and Elimination of Compensation; Rebuttal Testimony on Behalf of MCI.

New Mexico:

September 28, 1987; Docket No. 87_61_TC; Application of MCI for a Certificate of Public Convenience and Necessity; Direct Testimony on Behalf of MCI.

August 30, 1996: Docket No. 95-572-TC; Petition of AT&T for IntraLATA Equal Access; Rebuttal Testimony on Behalf of MCI.

New York:

April 30, 1992; Case 28425; Comments of MCI Telecommunications Corporation on IntraLATA Presubscription.

June 8, 1992; Case 28425; Reply Comments of MCI Telecommunications Corporation on IntraLATA Presubscription.

North Carolina:

August 4, 2000; Docket No. P779 SUB4; Petition of Level (3) Communications, LLC for Arbitration with Bell South; Direct Testimony on Behalf of Level (3) Communications, LLC.

September 18, 2000; Docket No. P779 SUB4; Petition of Level (3) Communications, LLC for Arbitration with Bell South; Rebuttal Testimony on Behalf of Level (3) Communications, LLC.

North Dakota:

June 24, 1991; Case No. PU-2320-90-183 (Implementation of SB 2320 -- Subsidy Investigation); Direct Testimony on Behalf of MCI.

October 24, 1991; Case No. PU-2320-90-183 (Implementation of SB 2320 -- Subsidy Investigation); Rebuttal Testimony on Behalf of MCI.

Oklahoma:

April 2, 1992; Cause No. 28713; Application of MCI for Additional CCN Authority to Provide IntraLATA Services; Direct Testimony on Behalf of MCI.

June 22, 1992; Cause No. 28713; Application of MCI for Additional CCN Authority to Provide IntraLATA Services; Rebuttal Testimony on Behalf of MCI.

Oregon:

October 27, 1983; Docket No. UT 9; Pacific Northwest Bell Telephone Company Business Measured Service; Direct Testimony on Behalf of the Public Utility Commissioner of Oregon.

April 23, 1984; Docket No. UT 17; Pacific Northwest Bell Telephone Company Business Measured Service; Direct Testimony on Behalf of the Public Utility Commissioner of Oregon.

May 7, 1984; Docket No. UT 17; Pacific Northwest Bell Telephone Company Business Measured Service; Rebuttal Testimony on Behalf of the Public Utility Commissioner of Oregon.

October 31, 1986; Docket No. AR 154; Administrative Rules Relating to the Universal Service Protection Plan; Rebuttal Testimony on Behalf of MCI.

September 6, 1996; Docket ARB3/ARB6; Petition of MCI for Arbitration with U S WEST Communications, Inc.; Direct Testimony on Behalf of MCI.
October 11, 1996; Docket No. ARB 9; Interconnection Contract Negotiations Between MCImetro and GTE; Direct Testimony on Behalf of MCI.

November 5, 1996; Docket No. ARB 9; Interconnection Contract Negotiations Between MCImetro and GTE; Rebuttal Testimony on Behalf of MCI.

Pennsylvania:

December 9, 1994; Docket No. I-00940034; Investigation Into IntraLATA Interconnection Arrangements (Presubscription); Direct Testimony on Behalf of MCI.

Rhode Island:

April 30, 1993; Docket No. 2089; Dialing Pattern Proposal Made by the New England Telephone Company; Direct Testimony on Behalf of MCI.

South Dakota:

November 11, 1987; Docket No. F_3652_12; Application of Northwestern Bell Telephone Company to Introduce Its Contract Toll Plan; Direct Testimony on Behalf of MCI.

Texas:

June 5, 2000; PUC Docket No. 22441; Petition of Level 3 for Arbitration with Southwestern Bell Telephone Company; Direct Testimony on Behalf of Level (3) Communications, LLC.

June 12, 2000; PUC Docket No. 22441; Petition of Level 3 for Arbitration with Southwestern Bell Telephone Company; Rebuttal Testimony on Behalf of Level (3) Communications, LLC.

Utah:

November 16, 1987; Case No. 87_049_05; Petition of the Mountain State Telephone and Telegraph Company for Exemption from Regulation of Various Transport Services; Direct Testimony on Behalf of MCI.

July 7, 1988; Case No. 83_999_11; Investigation of Access Charges for Intrastate InterLATA and IntraLATA Telephone Services; Direct Testimony on Behalf of MCI.

November 8, 1996; Docket No. 96-095-01; MCImetro Petition for Arbitration with USWC Pursuant to 47 U.S.C. Section 252; Direct Testimony on Behalf of MCI.

November 22, 1996; Docket No. 96-095-01; MCImetro Petition for Arbitration with USWC Pursuant to 47 U.S.C. Section 252; Rebuttal Testimony on Behalf of MCI.

September 3, 1997; Docket No. 97-049-08; USWC Rate Case; Surrebuttal Testimony on Behalf of MCI.

September 29, 1997; Docket No. 97-049-08; USWC Rate Case; Revised Direct Testimony on Behalf of MCI.

Washington:

September 27, 1988; Docket No. U_88_2052_P; Petition of Pacific Northwest Bell Telephone Company for Classification of Services as Competitive; Direct Testimony on Behalf of MCI.

October 11, 1996; Docket No. UT-960338; Petition of MCImetro for Arbitration with GTE Northwest, Inc., Pursuant to 47 U.S.C.252; Direct Testimony on Behalf of MCI.

November 20, 1996; Docket No. UT-960338; Petition of MCImetro for Arbitration with GTE Northwest, Inc., Pursuant to 47 U.S.C.252; Rebuttal Testimony on Behalf of MCI.

January 13, 1998; Docket No. UT-970325; Rulemaking Workshop re Access Charge Reform and the Cost of Universal Service; Comments and Presentation on Behalf of MCI.

West Virginia:

October 11, 1994; Case No. 94-0725-T-PC; Bell Atlantic - West Virginia Incentive Regulation Plan; Direct Testimony on Behalf of MCI.

June 18, 1998; Case No. 97-1338-T-PC; Petition of WorldCom, Inc. for Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.; Rebuttal Testimony on Behalf of MCI.

Wisconsin:

October 31, 1988; Docket No. 05_TR_102; Investigation of Intrastate Access Costs, Settlements, and IntraLATA Access Charges; Direct Testimony on Behalf of MCI.

November 14, 1988; Docket No. 05_TR_102; Investigation of Intrastate Access Costs, Settlements, and IntraLATA Access Charges; Rebuttal Testimony on Behalf of MCI.

December 12, 1988; Docket No. 05_TI_116; In the Matter of Provision of Operator Services; Rebuttal Testimony on Behalf of MCI.

March 6, 1989; Docket No. 6720_TI_102; Review of Financial Data Filed by Wisconsin Bell, Inc.; Direct Testimony on Behalf of MCI.

May 1, 1989; Docket No. 05_NC_100; Amendment of MCI's CCN for Authority to Provide IntraLATA Dedicated Access Services; Direct Testimony on Behalf of MCI.

May 11, 1989; Docket No. 6720_TR_103; Investigation Into the Financial Data and Regulation of Wisconsin Bell, Inc.; Rebuttal Testimony on Behalf of MCI.

July 5, 1989; Docket No. 05-TI-112; Disconnection of Local and Toll Services for Nonpayment -- Part A; Direct Testimony on Behalf of MCI.

July 5, 1989; Docket No. 05-TI-112; Examination of Industry Wide Billing and Collection Practices -- Part B; Direct Testimony on Behalf of MCI.

July 12, 1989; Docket No. 05-TI-112; Rebuttal Testimony in Parts A and B on Behalf of MCI.

October 9, 1989; Docket No. 6720-TI-102; Review of the WBI Rate Moratorium; Direct Testimony on Behalf of MCI.

November 17, 1989; Docket No. 6720-TI-102; Review of the WBI Rate Moratorium; Rebuttal Testimony on Behalf of MCI.

December 1, 1989; Docket No. 05-TR-102; Investigation of Intrastate Access Costs, Settlements, and IntraLATA Access Charges; Direct Testimony on Behalf of MCI.

April 16, 1990; Docket No. 6720-TR-104; Wisconsin Bell Rate Case; Direct Testimony of Behalf of MCI.

October 1, 1990; Docket No. 2180-TR-102; GTE Rate Case and Request for Alternative Regulatory Plan; Direct Testimony on Behalf of MCI.

October 15, 1990; Docket No. 2180-TR-102; GTE Rate Case and Request for Alternative Regulatory Plan; Rebuttal Testimony on Behalf of MCI.

November 15, 1990; Docket No. 05-TR-103; Investigation of Intrastate Access Costs and Intrastate Access Charges; Direct Testimony on Behalf of MCI.

April 3, 1992; Docket No. 05-NC-102; Petition of MCI for IntraLATA 10XXX 1+ Authority; Direct Testimony on Behalf of MCI.

Wyoming:

June 17, 1987; Docket No. 9746 Sub 1; Application of MCI for a Certificate of Public Convenience and Necessity; Direct Testimony on Behalf of MCI.

May 19, 1997; Docket No. 72000-TC-97-99; In the Matter of Compliance with Federal Regulations of Payphones; Oral Testimony on Behalf of MCI.

Comments Submitted to the Federal Communications Commission and/or the Department of Justice

March 6, 1991; Ameritech Transmittal No. 518; Petition to Suspend and Investigate on Behalf of MCI re Proposed Rates for OPTINET 64 Kbps Service.

April 17, 1991; Ameritech Transmittal No. 526; Petition to Suspend and Investigate on Behalf of MCI re Proposed Flexible ANI Service.

August 30, 1991; Ameritech Transmittal No. 555; Petition to Suspend and Investigate on Behalf of MCI re Ameritech Directory Search Service.

September 30, 1991; Ameritech Transmittal No. 562; Petition to Suspend and Investigate on Behalf of MCI re Proposed Rates and Possible MFJ Violations Associated with Ameritech's OPTINET Reconfiguration Service (AORS).

October 15, 1991; CC Docket No. 91-215; Opposition to Direct Cases of Ameritech and United (Ameritech Transmittal No. 518; United Transmittal No. 273) on Behalf of MCI re the introduction of 64 Kbps Special Access Service.

November 27, 1991; Ameritech Transmittal No. 578; Petition to Suspend and Investigate on Behalf of MCI re Ameritech Directory Search Service.

September 4, 1992; Ameritech Transmittal No. 650; Petition to Suspend and Investigate on Behalf of MCI re Ameritech 64 Clear Channel Capability Service.

February 16, 1995; Presentation to FCC Staff on the Status of Intrastate Competition on Behalf of MCI.

November 9, 1999; Comments to FCC Staff of Common Carrier Bureau on the Status of OSS Testing in Arizona on Behalf of MCI WorldCom, Inc.

November 9, 1999; Comments to the Department of Justice (Task Force on Telecommunications) on the Status of OSS Testing in Arizona and the USWC Collaborative on Behalf of MCI WorldCom, Inc.

Presentations Before Legislative Bodies:

April 8, 1987; Minnesota; Senate File 677; Proposed Deregulation Legislation; Comments before the House Committee on Telecommunications.

October 30, 1989; Michigan; Presentation Before the Michigan House and Senate Staff Working Group on Telecommunications; "A First Look at Nebraska, Incentive Rates and Price Caps," Comments on Behalf of MCI.
May 16, 1990; Wisconsin; Comments Before the Wisconsin Assembly Utilities Committee Regarding the Wisconsin Bell Plan for Flexible Regulation, on Behalf of MCI.

March 20, 1991; Michigan; Presentation to the Michigan Senate Technology and Energy Committee re SB 124 on behalf of MCI.

May 15, 1991; Michigan; Presentation to the Michigan Senate Technology and Energy Commission and the House Public Utilities Committee re MCI's Building Blocks Proposal and SB 124/HB 4343.

March 8, 2000; Illinois; Presentation to the Environment & Energy Senate Committee re Emerging Technologies and Their Impact on Public Policy, on Behalf of MCI WorldCom, Inc.

Presentations Before Industry Groups -- Seminars:

May 17, 1989; Wisconsin Public Utility Institute -- Telecommunications Utilities and Regulation; May 15-18, 1989; Panel Presentation -- Interexchange Service Pricing Practices Under Price Cap Regulation; Comments on Behalf of MCI.

July 24, 1989; National Association of Regulatory Utility Commissioners -- Summer Committee Meeting, San Francisco, California. Panel Presentation -- Specific IntraLATA Market Concerns of Interexchange Carriers; Comments on Behalf of MCI.

May 16, 1990; Wisconsin Public Utility Institute -- Telecommunications Utilities and Regulation; May 14-18, 1990; Presentation on Alternative Forms of Regulation.

October 29, 1990; Illinois Telecommunications Sunset Review Forum; Two Panel Presentations: Discussion of the Illinois Commerce Commission's Decision in Docket No. 88-0091 for the Technology Working Group; and, Discussion of the Treatment of Competitive Services for the Rate of Return Regulation Working Group; Comments on Behalf of MCI.

May 16, 1991; Wisconsin Public Utility Institute -- Telecommunications Utilities and Regulation Course; May 13-16, 1991; Participated in IntraLATA Toll Competition Debate on Behalf of MCI.

November 19, 1991; TeleStrategies Conference -- "Local Exchange Competition: The $70 Billion Opportunity." Presentation as part of a panel on "IntraLATA 1+ Presubscription" on Behalf of MCI.

July 9, 1992; North Dakota Association of Telephone Cooperatives Summer Conference, July 8-10, 1992. Panel presentations on "Equal Access in North Dakota: Implementation of PSC Mandate" and "Open Network Access in North Dakota" on Behalf of MCI.

December 2-3, 1992; TeleStrategies Conference -- "IntraLATA Toll Competition -- A Multi-Billion Dollar Market Opportunity." Presentations on the interexchange carriers' position on intraLATA dialing parity and presubscription and on technical considerations on behalf of MCI.

March 14-17, 1993; NARUC Introductory Regulatory Training Program; Panel Presentation on Competition in Telecommunications on Behalf of MCI.

May 13-14, 1993; TeleStrategies Conference -- "IntraLATA Toll Competition -- Gaining the Competitive Edge"; Presentation on Carriers and IntraLATA Toll Competition on Behalf of MCI.

May 23-26, 1994; The 12th Annual National Telecommunications Forecasting Conference; Represented IXCs in Special Town Meeting Segment Regarding the Convergence of CATV and Telecommunications and other Local Competition Issues.

March 14-15, 1995; "The LEC-IXC Conference"; Sponsored by Telecommunications Reports and Telco Competition Report; Panel on Redefining the IntraLATA Service Market -- Toll Competition, Extended Area Calling and Local Resale.

August 28-30, 1995; "Phone+ Supershow '95"; Playing Fair: An Update on IntraLATA Equal Access; Panel Presentation.

August 29, 1995; "TDS Annual Regulatory Meeting"; Panel Presentation on Local Competition Issues.

December 13-14, 1995; "NECA/Century Access Conference"; Panel Presentation on Local Exchange Competition.

October 23, 1997; "Interpreting the FCC Rules of 1997"; The Annenberg School for Communication at the University of Southern California; Panel Presentation on Universal Service and Access Reform.

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.	)	
Plaintiff,	)	Civil Action No. 97-D-152 (and consolidated cases)
v.	)	
ROBERT J. HIX, et al.,	)	
Defendants.	)	

MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION AS *AMICUS CURIAE*

GARY G. GRINDLER
Acting Assistant Attorney General

HENRY L. SOLANO
United States Attorney

STEPHEN TAYLOR
Assistant United States Attorney
1961 Stout Street
Suite 1200
Denver, CO 80294
Telephone: (303) 844-2081

THEODORE C. HIRT
MARTHA HIRSCHFIELD
U.S. Department of Justice
Federal Programs Branch
PO Box 883
901 E. Street, N.W., Room 860
Washington, D.C. 20044
Telephone: (202) 305-1432

OF COUNSEL

CHRISTOPHER WRIGHT
General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

STEWART A. BLOCK
PAMELA L. SMITH
Counsel
Federal Communications Commission
1919 M Street, N.W., Room 602
Washington, D.C. 20554

Date: March 3, 1998

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Agency Rulings: **Page**

Statutes and Regulations: **Page**

Other Authorities: **Page**

MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION AS *AMICUS CURIAE*

The Federal Communications Commission ("FCC") submits this Memorandum as *amicus curiae*. The issue before the Court is whether the Interconnection Agreements between U.S. West Communications, Inc. ("U.S. West") and several new entrants, including MCImetro Access Transmission Services, Inc. and MCI Telecommunications Corporation (jointly, "MCI") and AT&T Communications of the Mountain States, Inc. ("AT&T"),[1] as approved by the Colorado Public Utilities Commission ("CPUC"), meets the requirements of Sections 251 and 252 of the Telecommunications Act of 1996.[2] The FCC seeks to assist this Court in its consideration of the matter by providing the Court with the FCC's interpretation of the requirements of the 1996 Act, as applicable to certain of the issues presented by the parties to this action.

INTRODUCTION

In the conference report on the 1996 Act, the Conference Committee explained the fundamental purpose of the statute:

> [T]o provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information

---

[1] The other new entrants are: Sprint Communications Company, L.P.; WorldCom Technologies, Inc.; TCG Colorado and Teleport Communications Group, Inc.; and, ICG Telecom Group, Inc.

[2] The Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, was enacted February 8, 1996. The 1996 Act amends the Communications Act of 1934, 47 U.S.C. §§151, *et. seq.* The sections of the 1996 Act relevant here are codified in corresponding section numbers of 47 U.S.C. Only the statutory section will be cited here.

> technologies and services to all Americans by opening all telecommunications markets to competition . . . .

S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement of the Committee of Conference). This legislative purpose has guided the FCC's implementation of the 1996 Act and should inform this Court's review under Section 252(e)(6).

A. The Local and Interexchange Markets.

Traditionally, wireline telephone service within the United States has been divided into two principal markets -- local and long distance. Local telephone service is generally provided over a single network -- often called a "local exchange" -- that serves all customers in a given geographical area. The core of the local network is the "local loop" -- which typically consists of wires connecting each customer to a local switch. Companies that provide local telephone service are called local exchange companies ("LECs").

A long distance call, by contrast, refers to any call that extends from one local exchange to another. For that reason, long distance service is sometimes called "interexchange" service, and long distance companies are called interexchange companies ("IXCs"). In order to place and receive long distance calls, IXCs must rely on the very same local exchange facilities used by LECs to provide local service. Thus, when a typical long distance call is made, the call is transported along the LEC's network from the individual caller to a point of interconnection with an IXC. The IXC then transports the call, usually by broadcast or wire, to a second LEC, which completes the call to the appropriate destination. For the use of the local exchange facilities in originating or terminating long distance calls,

IXCs pay LECs "access fees." Access fees can be either inter- or intra-state, depending on whether the interexchange call extends beyond a single state's boundaries.

B. The AT&T Break-Up.

Prior to 1984, AT&T owned most of the large LECs, giving it monopoly control over local telephone markets. The AT&T-owned LECs were known as "Bell Operating Companies" or "BOCs." Interexchange service was also historically operated as a monopoly service, again provided by AT&T, interconnecting all local exchanges in an integrated nationwide network, known as the Bell System.

Over the past twenty years, the FCC has introduced competition into various aspects of the telecommunications industry.[3] The long distance market was one of the first segments of the industry to experience significant competition. At first, competitors in that market faced severe obstacles. Notably, because new entrants were dependent on the BOCs for access to the local exchange network, the BOCs could use their local monopolies to favor AT&T's long distance operations. A turning point occurred in 1974 when the United States filed suit alleging that AT&T violated federal antitrust laws by using its monopoly power over the local exchange to foreclose competition in the long distance market (and in telephone equipment

[3] See, e.g., *Specialized Common Carriers*, 29 F.C.C.2d 870 (1970), *aff'd, Washington Util. & Trans. Comm'n v. FCC*, 513 F.2d 1142, 1157-60 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (permitting competition in private line services); *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250, 1269 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (requiring BOC to interconnect with new interexchange carriers); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1105 (D.C. Cir. 1981) (requiring non-Bell LECs to interconnect with interexchange carriers); *Regulatory Policies Concerning Resale and Shared Use of Common Services and Facilities*, 60 F.C.C.2d 261, *modified*, 61 F.C.C.2d 70 (1976) (permitting companies that lease private line services at a bulk discount rate to resell those services to individual customers), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17, 23 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

manufacturing). *See United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1348-57, 1363-81 (D.D.C. 1981) (summarizing the antitrust claims against AT&T). That suit ultimately led to a consent decree that required the break-up of AT&T in 1984.[4] Under that decree, the LECs owned by AT&T were reorganized into seven independent regional holding companies, which continued to have monopoly control over the local exchange networks but which were prohibited from providing interexchange services. By separating AT&T's long distance service from its local subsidiaries, the consent decree removed an incentive for the BOCs to favor one IXC over another. As a further precaution, the consent decree gave all IXCs "equal access" to the local exchange network on terms equal to those given to AT&T's long distance company. 552 F. Supp. at 195.

C. The Telecommunications Act of 1996.

The consent decree and FCC actions spurred the growth of competition in the long distance market. But the local exchange market continued to be dominated by the LECs, which held monopolies in their geographic regions. A primary purpose of the Telecommunications Act of 1996 was to open this local segment of the telecommunications market to competition. To achieve that goal, the Act swept away laws and regulations that previously protected local telephone carriers from competitive pressures. *See, e.g.*, 47 U.S.C. § 253 ("Removal of Barriers to Entry"). Congress also recognized that, even without these restrictive rules, new competitors would have difficulty entering the local market because of the enormous expense of constructing a new local network.

---

[4] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The 1996 Act therefore requires incumbent LECs to provide certain services and facilities to new competitors (Section 251(a), (b), (c)). Among other things, Sections 251(c)(2)-(4) of the 1996 Act impose three federal duties on incumbent LECs:

- ***interconnection*** Section 251(c)(2) requires incumbent LECs to allow competitors to interconnect with the incumbent LECs' local exchange networks at just, non-discriminatory rates;

- ***unbundled network elements*** -- Section 251(c)(3) requires incumbent LECs to permit competitors to lease parts of the incumbent LECs' networks at just, non-discriminatory rates; and

- ***resale*** -- Section 251(c)(4) requires incumbent LECs to allow competitors to purchase local telephone services at wholesale rates and resell those services to the competitors' customers.

To determine the just and reasonable rates, Section 252(d) of the Act provides specific pricing standards to be used for each of these options. Thus, Section 252(d)(1) states that rates for interconnection and for unbundled network elements must be based on "cost" which "may include a reasonable profit." Section 252(d)(3) provides that the wholesale rates for resale must be based on "retail rates . . . excluding . . . costs that will be avoided by" the LEC.

In order to translate the general obligations of Sections 251 and 252 into detailed requirements, the Act calls upon individual incumbent LECs and new entrants to negotiate in good faith over the specific terms and conditions of an "interconnection agreement" that meets the Act's goals. 47 U.S.C. §§ 251(c)(1), 252(a)(1). The Act encourages the parties to enter into voluntary agreements, but should the parties fail to reach an agreement through negotiation, permits either party to petition the respective state public utility commission

("PUC") for arbitration of any open issue.[5] In arbitrating these cases, the PUC is obligated to apply applicable FCC regulations to the specific issues in dispute. *See* 47 U.S.C. §§ 252(c)(1), (e)(2)(B). Any aggrieved party may bring a challenge to the state arbitration decision in federal district court, and the court must then determine whether the agreement "meets the requirements of section 251 and [252]." 47 U.S.C. § 252(e)(6).

D. Implementation of the Local Competition Provisions.

Section 251(d) of the Act directs the FCC to act within six months to "establish regulations to implement the requirements" of Section 251. Pursuant to that authority, the FCC issued regulations on August 8, 1996, implementing the pricing and non-pricing requirements of the Act's local competition provisions. *In re Implementation of Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996) ("*FCC Order*"), *rev'd in part and aff'd in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3387, 3459 (Jan. 26, 1998) (Nos. 97-826, 829-31, 1075, 1087, 1099, 1141).

With respect to pricing matters, the FCC found that the specific rates set by PUCs would determine whether the 1996 Act would be implemented "in a manner that is *pro-competitor* and favors one party . . . or, as we believe Congress intended, *pro-competition*." *FCC Order* ¶ 618. Thus, the FCC deemed it "critical" to establish "a common, pro-competition understanding of the pricing standards" for interconnection, unbundled access, and resale. *Id.*

---

[5] The term "PUC" will be used in this brief to refer to state commissions generally. The Colorado Public Utilities Commission in particular will be referred to as the "CPUC."

The FCC also issued regulations clarifying carriers' obligations with respect to non-pricing matters. Many of these regulations related to the incumbent LECs' interconnection and unbundling obligations. For example, the FCC determined that, in identifying technically feasible points of interconnection, PUCs should not consider the cost or expense of providing interconnection at a given point. *See FCC Order* ¶ 198. In the FCC's view, Congress distinguished between "technical" and "economic" considerations in the 1996 Act, and only deemed the former relevant in establishing the incumbent LECs' interconnection obligation. *See FCC Order* ¶ 199.

E. Review of the *FCC Order* in the Eighth Circuit.

Various interested parties filed petitions for judicial review of the *FCC Order*, which ultimately were consolidated in a massive proceeding in the Eighth Circuit. *Iowa Utils. Bd. v. FCC*, 8th Cir. No. 96-3321 (and consolidated cases). After full briefing and oral argument, the Eighth Circuit, in July 1997, issued an opinion that addressed many of the challenges to the *FCC Order*. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). In that opinion, the court held that the FCC lacked jurisdiction under the 1996 Act to establish rules for setting the prices of intrastate access and interconnection. 120 F.3d at 793-800.[6] That decision will be reviewed by the United States Supreme Court, which recently granted certiorari. *See* 66 U.S.L.W. 3387 (Jan. 26, 1998) (No. 97-831).

[6] In a recent order, the Eighth Circuit stated that the FCC likewise did not have jurisdiction to enforce its pricing rules through application of Section 271 of the Act, and ordered the FCC not to do so. *See* __ F.3d __, 1998 WL 30655 (8th Cir. Jan. 22, 1998).

The Eighth Circuit reached the merits of the challenges to the FCC's non-pricing rules promulgated pursuant to Section 251. For example, the court rejected challenges to various aspects of the FCC's rules concerning unbundled network elements. 120 F.3d at 807-18. The court also held that the FCC properly exercised its statutory authority when it found that a LEC's discounted and promotional offerings are "telecommunication service[s]" subject to the resale requirement of Section 251(c)(4). 120 F.3d at 819.

Thus, the Eighth Circuit did not hold that the FCC lacks all regulatory authority over the provision of intrastate telecommunications services under Sections 251 and 252. To the contrary, the Eighth Circuit specifically recognized that the FCC has regulatory authority (including authority to regulate the intrastate aspects) over such diverse matters as local number portability (Section 251(b)(2)), prevention of discriminatory conditions on resale (Section 251(c)(4)(B)), the obligation to provide unbundled network elements (Section 251(d)(2)), numbering administration (Section 251(e)), continued enforcement of local exchange access (Section 251(g)), and treatment of comparable carriers as incumbents (Section 251(h)(2)). *See* 120 F.3d at 794 n.10, 802 n.23. The court further acknowledged that the FCC's rules in these areas would preempt any state rules that conflict with the substantive provisions of Section 251 or substantially prevent their implementation. 120 F.3d at 807.

SUMMARY OF ARGUMENT

The parties have raised various issues regarding the CPUC's arbitration orders. First, U.S. West has raised several objections to the CPUC's orders, which are governed by binding FCC regulations. For example, U.S. West objects to the CPUC's determination that a new entrant may provide finished service entirely through unbundled network elements. That

determination is mandated by FCC rules. Thus, U.S. West's challenge represents an impermissible attack on the legality of the FCC's rules because, under existing law, the Courts of Appeals retain the exclusive jurisdiction to hear such claims. As such, U.S. West's collateral attacks in this Court must be dismissed, or, in the alternative, the CPUC's determinations that are consistent with the 1996 Act and binding FCC rules, should be affirmed.

MCI challenges the CPUC's determination that MCI must make multiple points of interconnection. That determination is inconsistent with the requirements of the 1996 Act and binding FCC rules, and, therefore, should be reversed. In addition, AT&T challenges the CPUC's determination that contract service arrangements are exempt from resale at a wholesale discount. This determination also is inconsistent with the 1996 Act and binding FCC rules. Lastly, the CPUC's determination that promotional offerings of 90 days or less are exempt from resale is inconsistent with the 1996 Act.[7]

ARGUMENT

A. U.S. West May Not Challenge the Validity of Binding FCC Rules in This Proceeding But Must Raise Any Such Challenge in the Courts of Appeal.

Section 251 of the 1996 Act imposes duties on incumbent LECs, like U.S. West, relating to interconnection, resale, and unbundled network elements. Several of the 1996 Act's

[7] The FCC does not respond in this brief to every issue raised by the parties, because many are fact-specific and best addressed by the litigants themselves. In addition, the FCC declines to address procedural objections, such as U.S. West's claim that the CPUC's decisions violate due process, because those issues do not directly concern application of the statutory standards or the FCC's rules.

provisions specifically require compliance with FCC rules implementing the 1996 Act.[8] The Eighth Circuit's decision left undisturbed many of the FCC's rules.[9] These rules remain fully in force, and PUCs are required to comply with them in resolving arbitration disputes.[10] To the extent the U.S. West objects to aspects of the CPUC's arbitration orders that are governed by binding FCC regulations, those challenges represent collateral attacks on the underlying federal regulations, and should be dismissed. Under 28 U.S.C. § 2342, commonly called the Hobbs Act, the "exclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals." *FCC v. ITT World Comm., Inc.*, 466 U.S. 463, 468 (1984); *Grantwood Village v. Missouri Pac. R.R. Co.*, 95 F.3d 654, 657-58 (8th Cir. 1996). Unless and until a court of appeals stays or invalidates the federal regulations, a district court must assume the validity of those rules. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 905-07 (8th Cir. 1984), *vacated on other grounds, Arkansas Pub. Serv. Comm'n v. Southwestern Bell Tel. Co.*, 476 U.S. 1167 (1986).[11]

---

[8] *See, e.g.*, Section 251(b)(2) (implementation of number portability requirement).

[9] *See Iowa Utils. Bd.*, 120 F.3d at 819 n. 39 (listing the specific rules vacated).

[10] *See* Section 252(c)(1) (in resolving arbitration issues, the PUC must "meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to section 251); Section 252(e)(2)(B) (the PUC must approve the interconnection agreement unless "the agreement does not meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251")..

[11] This system is analogous to the approach taken by district courts when they are asked to enforce FCC orders pursuant to 47 U.S.C. § 401: "When asked to determine if a person, which includes a state public utility commission, has violated an FCC order, a district court must accept as valid the FCC order in question." *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 812 F. Supp. 706, 708 (W.D. Tex. 1993). *See also Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Reg.*, 588 F. Supp. 5, 7 (D. Mont. 1983) (a district court "lacks jurisdiction to review the efficacy and validity of" an FCC preemption order, which "is binding

U.S. West cannot avoid the strictures of the Hobbs Act by characterizing its challenge as one directed against the CPUC's arbitration decision, rather than the FCC rules themselves, because the CPUC is bound to adhere to FCC rules. Thus, U.S. West's challenges to the CPUC's order implementing the FCC rules effectively are challenges to the legal import of the FCC's order itself. The Supreme Court has said that "[l]itigants may not evade [the Hobbs Act] by requesting the district court to enjoin action that is the outcome of the agency's order." *FCC v. ITT World Comm., Inc.*, 466 U.S. at 468. Thus, a district court lacks authority to grant relief that would have the practical effect of suspending or setting aside an agency order, even if the complaint does not expressly challenge the FCC's regulations. *See Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996).

B. The CPUC's Determination That A New Entrant May Provide "Finished Service" Entirely Through Unbundled Elements Is Consistent With the Requirements of the 1996 Act and Binding FCC Rules.

U.S. West argues that CPUC's arbitration orders improperly permit new entrants to engage in what U.S. West pejoratively refers to as "sham unbundling." In their challenges before the Eighth Circuit, incumbent LECs used the term "sham unbundling" to object to FCC rules that allow a new entrant to provide finished service entirely through unbundled network elements. The incumbent LECs unsuccessfully argued to the Eighth Circuit that a new entrant must provide *some* facilities when it seeks to provide a service through unbundled network elements. The Eighth Circuit rejected these arguments, and expressly affirmed the FCC's position that the plain meaning of Section 251(c)(3) allows new entrants to provide finished

---

upon the state public service commissions until reversed" by a court of appeals).

telecommunications services to the public entirely by acquiring all of the necessary elements from an incumbent LEC, and that resale is not the exclusive means by which a new entrant who does not own or control any portion of a telecommunications network can enter the local telecommunications market:

> [W]e believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements.
>
> . . . .
>
> We do not believe that this interpretation of subsection 251(c)(3) will cause all requesting carriers to select unbundled access over resale as their preferred route to enter the local telecommunications market. Although a competing carrier may obtain the capability of providing local telephone service at cost-based rates under unbundled access as opposed to wholesale rates under resale, unbundled access has several disadvantages that preserve resale as a meaningful alternative.

Iowa Utils. Bd., 120 F.3d at 814-15.[12] Accordingly, a new entrant need not provide any of its own facilities when providing a service through unbundled network elements. Thus, the CPUC's determination that a new entrant may provide finished service entirely through unbundled network elements, is consistent with the requirements of the 1996 Act and binding FCC regulations, and should be affirmed.[13]

---

[12] *See also FCC Order* ¶¶ 328-41 (which discuss the FCC's conclusion that under the 1996 Act, carriers do not need to own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide telecommunications service.)

[13] The FCC does not address U.S. West's additional arguments concerning the requesting carriers' responsibility to combine unbundled network elements themselves.

C. A New Entrant May Interconnect At Any Technically Feasible Point Within the Incumbent LEC's Network, and, Therefore, It Was Improper for the CPUC To Require MCI To Interconnect At Each Local Calling Area In Which It Offers Service.

MCI challenges the CPUC's determination that MCI cannot establish a single point of interconnection in each of Colorado's two Local Access Transport Areas ("LATAs"), but must interconnect in each of multiple local calling areas in which MCI receives or delivers local traffic. *See* MCImetro Access Transmission Services, Inc. and U.S. West Communications, Inc. Interconnection Agreement, Attachment 4 § 2.2.

Under the 1996 Act, a new entrant may interconnect with the incumbent LEC's facilities "at any technically feasible point." Section 251(c)(2); *see also* 251 (c)(3). The incumbent LEC only is relieved of its obligation to provide interconnection at a particular point in its network, if it proves to the PUC that interconnection at that point is not technically feasible. 47 C.F.R. § 51.305(e); *see also FCC Order* ¶¶ 198, 203, 205.

Neither the 1996 Act nor binding FCC regulations allow the incumbent LEC or the PUC to impose interconnection at any particular point in the LEC's network. Provided that such interconnection is technically feasible, only the new entrant has the right to designate where interconnection should take place: "Section 251(c)(2) gives *competing carriers* the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point in the network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points." *FCC Order* ¶ 209 (emphasis added).

The CPUC erroneously relied on economic considerations in requiring additional points of interconnection: "Requiring that [U.S. West] trunk calls from one local calling area to a

distant [point of interconnection] without compensation to increase the efficiency of [MCI] is not appropriate." Defendants MCImetro Access Transmission Services, Inc. and MCI Telecommunications Corporation's Brief in Support of Counts Five Through Twelve of Their Complaint at 38 (quoting CPUC Reconsideration Order at 3). The 1996 Act "bars consideration of costs in determining 'technically feasible' points of interconnection or access." *FCC Order* ¶ 199.[14] Consequently, a PUC cannot consider the cost to the incumbent LEC in determining the technical feasibility of points of interconnection. Considerations of technical feasibility "refer[] solely to technical or operational concerns, rather than economic, space, or site considerations." *FCC Order* ¶ 198. Thus, in the absence of proof by U.S. West that it is not technically feasible for MCI to establish a single point of interconnection in each LATA, the CPUC's determination that MCI must make multiple interconnections is inconsistent with the 1996 Act and binding FCC rules.

D. The CPUC's Limitation on Resale With Respect to Contract Service Arrangements Is Inconsistent With the 1996 Act and Binding FCC Regulations.

Contract service arrangements ("CSAs") are contractual agreements made between a carrier and a specific, typically high-volume customer, tailored to that customer's individual needs. CSAs are retail services within the meaning of Section 251(c)(4)(A). This section also provides that an incumbent LEC has a duty to offer retail services for resale at wholesale rates. The CPUC determined, however, that CSAs need not be offered to the reseller at wholesale

---

[14] Of course, the pricing of interconnection may reflect costs. "[A] requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." *FCC Order* ¶ 199.

rates: "resale discounts will not apply to individual case-based contracts." *See* Order Approving Application Regarding Interconnection Agreement with Modification (adopted Aug 20, 1997) (R26123) at 7-8. This determination is inconsistent with the requirements of the 1996 Act and binding FCC regulations.

That retail services must be offered for resale at wholesale rates in accordance with Section 251(c)(4)A) is compelled by various provisions of the 1996 Act. Section 252(c)(1) requires a PUC to "ensure" that the terms of the arbitration agreement meet the requirements of Section 251, including the regulations prescribed by the FCC pursuant to Section 251. Further, Section 252(c)(2) directs a PUC to establish rates for interconnection, services, or network elements according to Section 252(d). Section 252(d)(3) expressly provides that for the purposes of Section 251(c)(4), a PUC "*shall* determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." (Emphasis added). The 1996 Act thus mandates the imposition of wholesale rates for retail services, subject to regulations prescribed by the FCC to implement Section 251.

FCC regulations, in turn, provide that Section 251(c)(4) makes "no exception for promotional or discounted offerings, including contract and other customer-specific offerings." *FCC Order* ¶ 948. These resale regulations were neither stayed nor vacated by the Eighth Circuit, and, that court has made clear that the provision of the *FCC Order*, and the rules adopted therein, are equally enforceable. *Iowa Utils. Bd.*, 120 F.3d at 819. As such, *FCC Order* ¶ 948, was binding on the CPUC in the arbitrations at issue.

Section 251(c) holds open the possibility, however, that the PUC may impose some limitations on resale, so long as they are not "unreasonable or discriminatory." Notwithstanding that possibility, in implementing the incumbent LEC's duties under Section 251(c)(4)(B), the FCC determined that resale restrictions, including those on CSAs, are presumptively unreasonable. *FCC Order* ¶¶ 939, 948. Moreover, the FCC determined that the PUC's authority to approve restrictions on resale must be "narrowly tailored" (*see FCC Order* ¶ 939), and that the burden is on the incumbent LEC to prove to the PUC that the restrictions are reasonable and nondiscriminatory. 47 C.F.R. § 51.613(b).

Here, despite the requirements of Section 251(c)(4)(A) and the implementing regulations, the CPUC determined that U.S.West need not offer CSAs to AT&T at a wholesale discount: "AT&T can utilize, under the same terms and conditions, any volume discounts that [U S West] makes available to its end user customers." AT&T Communications of the Mountain States, Inc. and U S West Communications, Inc. Interconnection Agreement, Attachment 2 § 4.6.2. However, Section 251(c)(4)(A) compels that these services be made available at "wholesale rates," absent proof from U.S. West that the restriction is "reasonable and nondiscriminatory."

Even assuming that the CPUC intended to proceed under the "reasonable and nondiscriminatory" restriction provision of Section 251(c)(4)(B), the restriction is nonetheless discriminatory. The FCC rule, 47 C.F.R. § 51.613(b), implementing Section 251(c)(4)(B), authorizes only "narrowly tailored" exceptions that are proven by the incumbent LEC to be reasonable and nondiscriminatory. It does not authorize a general exemption of all CSAs, as determined by the CPUC. *See FCC Order* ¶ 948.

The FCC has determined that any service sold to end users is a retail service, and thus, is subject to the wholesale discount requirement, even if it is already priced at a discount off the price of another retail service, and that determination is binding on the CPUC. *FCC Order* ¶ 951. Cost such as billing, collection, and customer service are avoided when discounted services are resold. Thus, to the extent the service is already discounted, those costs may be accounted for in calculating the wholesale discount to be used when reselling to the competing carrier. *FCC Order* ¶¶ 951, 953. Therefore, the CPUC's general exemption of CSAs from resale at a wholesale discount is inconsistent with the 1996 Act and binding FCC rules.

E. Promotional Offerings of Less Than 90 Days Must Be Offered for Resale.

The 1996 Act and FCC regulations do not exempt promotional offerings of less than 90 days from resale. As noted above, promotional offerings of less than 90 days, are nonetheless retail services, and, therefore, must be made available for resale. *See FCC Order* ¶ 948. Such promotional offerings, however, may be offered for resale at the promotional rate and need not be subject to a wholesale discount. *See FCC Order* ¶ 950.

CONCLUSION

For the foregoing reasons, the FCC respectfully requests that, in reviewing the Interconnection Agreements approved by the Colorado Public Utilities Commission, the Court be guided by the FCC's statutory interpretations of the 1996 Act set forth herein.

Respectfully submitted,

GARY G. GRINDLER
Acting Assistant Attorney General

HENRY L. SOLANO
United States Attorney

STEPHEN TAYLOR
Assistant United States Attorney
1961 Stout Street
Suite 1200
Denver, CO 80294
Telephone: (303) 844-2081

OF COUNSEL

CHRISTOPHER WRIGHT
General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

STEWART A. BLOCK
PAMELA L. SMITH
Counsel
Federal Communications Commission
1919 M Street, N.W., Room 602
Washington, DC 20554

THEODORE C. HIRT
MARTHA HIRSCHFIELD
U.S. Department of Justice
Federal Programs Branch
P.O. Box 883
901 E. Street, N.W., Room 860
Washington, D.C. 20004
Telephone: (202) 305-1432

Attorneys for the Federal
Communications Commission

Date: March 2, 1998